

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1951

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No. 23

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HERMAN HAYMAN

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED MARCH 28, 1951  
CERTIORARI GRANTED MAY 14, 1951

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 642

THE UNITED STATES OF AMERICA, PETITIONER,  
vs.  
HERMAN HAYMAN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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2 IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v.

HERMAN HAYMAN, Defendant.

No. \_\_\_\_\_

Re: No. 19036 Criminal.

**Motion to Vacate Judgment and Sentence and Grounds for New  
Trial.—Filed May 11, 1949.**

To the Honorable William C. Mathis, Judge of the entitled Court.  
Defendant's Motion to Vacate Judgment and Sentence and  
Grounds for New Trial.

I

Comes now the defendant Herman Hayman, hereinafter called "the defendant," and moves the court to vacate the judgment and sentence heretofore imposed and to grant the defendant a new trial as charged in the indictment herein; and for grounds and jurisdiction therefore the defendant moves and prays and shows the following:

II.

JURISDICTION.

Jurisdiction to entertain this motion and grant the relief sought by the defendant herein is conferred upon this Honorable court by the common law remedy of writ of error coram nobis. Such common law is superseded in the federal courts by motion addressed to the court whose judgment and sentence is attached, and such motion may be brought long after the term of the court has expired at which the judgment and sentence was entered, and after this elapse of the period provided Criminal Procedure Rule

3 18 U.S.C.A. Sec. 688; 28 U.S.C.A. 723 A) as construed by the Ninth Circuit Court of Appeals in *Robinson v. Johnston* (1941) 118 Federal (2nd) 998, because the grounds upon which relief is sought herein is to bring to the attention of this Honorable Court facts which were not fully known to this Honorable Court at the time judgment and sentence was entered herein which, if fully known would have resulted in a different Verdict and judgment. Hence jurisdiction is sustained, *Robinson v. Johnston*, supra.

The Ninth Circuit Court of Appeals, in the *Robinson v. Johnston*, supra, which is directly in point with the defendant's contentions as to the jurisdiction over the instant motion, at page 1000.

## III.

## STATEMENT OF FACTS.

The defendant herein was indicted on November 20, 1946 in the Southern District of California (the indictment containing six counts) defendant was convicted on all six counts of an information charging the defendant in count one with violation of U.S.C., Title 18, Sec. 78, to-wit, falsely persuading a true and lawful holder of a debt of, and due from, the United States; in count Two with violation of U.S.C., Title 18, Sec. 63, to-wit, falsely making, forging, and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited a certain endorsement on a check; in count three with violation of U.S.C., Title 18, Sec. 73, to-wit, uttering and published as true, a false, forged and counterfeit signature on a check; in Count Four with violation of U.S.C., Title 18, Sec. 73, to-wit, forgery; in Count Five with violation of U.S.C., Title 18, Sec. 73, to-wit, uttering and publishing as true, and causing to be uttered and published as true, a false, forged and counterfeit signature on a check and in Count Six with violation of U.S.C. Title 18, Sec. 88, to-wit conspiracy.

## IV.

The defendant further claims that he was arrested without a warrant, and questioned for five days before he, the defendant was taken before a committing magistrate.

## V.

The purpose of requirement of Federal Rules of Criminal Procedure that prisoners should promptly be taken before committing magistrate is to check resort of officers to secrete, interrogation of persons accused of crime. Federal Rules of Criminal Procedure, rule 5(a), 18 U.S.C.A. Rules 5(a) provides that "An officer making an arrest \*\*\* shall take the arrested person without unnecessary delay before the magistrate "a complaint shall be filed forthwith."

Defendant contended that the officers had violated this rule in detaining him as they did without taking him before a committing magistrate.

The United States Supreme Court has recently held in Upshaw U.S.S., 69 S. Ct. 170. Mr. Justice Black delivered the opinion 5 of the Court:

The petitioner was convicted of grand larceny in the United States District Court for the District of Columbia and sentenced to serve sixteen months to four years in prison. Pre-trial confessions of guilt without which petitioner could not have been

convicted were admitted in evidence against his objection that they had been illegally obtained. The confession had been made during a 30-hour period while petitioner was held a prisoner after the police had arrested him on suspicion and without a warrant. Defendant was arrested by the F.B.I. Jailed and held incommunicado for over 5 days, that under these conditions petitioner not being informed of his constitutional rights, made damaging and incriminating statements previous to his arraignment before a committing magistrate; that failure of the F.B.I. to comply with rule (5A) 18 U.S.C.A. barred the introduction of any and all evidence against petitioner rule 5(A), 18 U.S.C.A.—Upshaw v. U.S., 695 et. 170; McNabb v. United States, 318 U.S. 332, 635 et. 608, 87 L. Ed. 819.

The defendant relies upon the guarantees of the 5th Amendment that "no person shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, without due process of law.

The defendant contends that the constitution forbades the use of this method against him, that a conviction in the Federal Courts, the foundation of which is evidence obtained in disregard of liberties *deemed* fundamental by the constitution cannot stand. rule 5(A), 18 U.S.C.A.

## VI.

The defendant further claims that he was deprived of the right to have the assistance of counsel for his defence, in that the defendant was not adequately represented by competent counsel, to-wit: On introduction in evidence of one Juanita Jackson, codefendant statements incriminating defendant, attorney for defendant was also attorney for codefendant "Juanita Jackson," attorney E. P. Entenza did not tell defendant that he was also defending Juanita Jackson, and defendant had no way of knowing until after his trial was over. Juanita Jackson, codefendant, and government witness accused defendant of guilt, thus creating conflict of interest, is not "qualified" to give efficient representation to any of such clients, as affecting constitutional right of qualified counsel for accused. U.S.C.A. Conts. Amends. 5, 6. Johnson v. Zerbst, 304 U.S. 458, 461, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357. Wright v. Johnston, Warden, 77 F. Supp. 687.

## VII.

The defendant herein was deprived of the right to have the assistance of counsel for his defense, in that the defendant was not adequately represented by competent counsel, to wit: that the defendant, an ignorant, layman, had no knowledge of law or legal procedure; that upon imposition of the twenty year's sentence, he vigorously protested his innocence, that the foregoing facts and averments were not fully known to this Court, and

the defendant herein was unable to bring such facts to the attention of this Court, and which, if known to this Court, would have resulted in a different judgment.

### VIII.

#### CONCLUSION.

In these days when democratic institutions are crumbling the Courts are the last bulwark for the salvation of democracy.

The fundamental principles of democracy are involved in the instant application. It is for this Honorable court to strengthen the bulwark of democracy by vacating the Judgment and sentence herein, and by granting the defendant a new trial.

### IV.

#### PRAYER.

Wherefore: Premises considered the defendant herein respectfully prays the following:

(A) That this Honorable Court permit the defendant herein to file this, his motion to vacate Judgment and sentence and grounds for a new trial, and that said court fix a time for a hearing on said Motion, and that evidence in support of said Motion be received and heard by the court orally, and in open court at said fixed time: and,

(B) That this Honorable Court by proper order entered in this cause direct that a writ of habeas corpus ad subjurendum or ad testificandum or other proper order issue from and out of and under the seal of this Honorable Court directing the Hon. P.

8 J. Squier, Warden of the United States Penitentiary at McNeil Island, situated in the county of Pierce, and in the State of Washington, to have the body of the defendant in this court on the day and date fixed by this court for a hearing on this the defendant's motion to vacate Judgment and sentence and to grant a new trial.

Respectfully submitted .

HERMAN HAYMAN

Herman Hayman, Defendant  
United States Penitentiary  
McNeil Island, Washington.

Duly sworn to by Herman Hayman, jurat omitted in printing.

Received copy of the within Pet. this 11th day of May 1949.  
United States Attorney Southern District of California. By L.  
WAYNE THOMAS, Administrative Officer. (Strike one)

## 9. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

(Title omitted).

To the Honorable William C. Mathis, Judge of The entitled Court.

## Amendment to Defendant's Motion to Vacate Judgment and Sentence and Grounds for New Trial.—Filed June 8, 1949.

Comes now the defendant, Herman Hayman; hereinafter called "the defendant," and moves the Court to vacate the judgment and sentence heretofore imposed on count (2) two of the indictment and for grounds and jurisdiction therefore the defendant moves and prays and shows the following.

(A)

That said sentence is null and void for the following reason, that count one and count two are one and the same, count Two of the indictment charges defendant with the forgery of the Thompson check (Government's Exhibit) Count one related to the falsely personate the Samuel Thompson check.

(B) In all court procedure it is essential that only one indictment can be brought for one offense—that is, that the determination of the essential elements which go to make up the offense.

10 (C) Where an indictment, though consisting of several counts is founded on a single transaction, the verdict is a unit, and lays the foundation for a single judgment.

(D) The judgment, though pronounced by the judge, is not the determination, but that of the law, which depends not on the arbitrary opinion of the judge, but on settled and irreversible principles of justice.

(E) In order that separate offenses charged in one indictment may carry separate punishments they must rest on distinct criminal acts and therefore, if they were committed at the same time and were parts of a continuous criminal act, and inspired by the same criminal intent which is an essential element of each offense, they are susceptible of but one punishment. For verification of the foregoing interpretation of law, see Munson v. McClaughry, 198 Fed. 72; 117 C.C.A. 180, 42 LRA (NS) 302; Stevens v. McClaughry, 207 Fed. 18; 125 C.C.A. 102, 51 LRA (NS) 390.

(F) The term "same offense" in Constitutional prohibition against double jeopardy signifies the same criminal act or omission, rather than same offense E C nomine (by any other name) constitution, Article 2 #21) If the State elects to prosecute an offense

in one of its aspects, it cannot prosecute for the same criminal acts under color of another name. See *Hunter v. State*, 277 Pac 953) Identify as to double punishment is show if the same evidence necessary to prove either offense will also necessarily establish the other (U.S.C.C.A Ky.) *Copperthwaite v. U. S.*, 37 Fed. (2d) 846.

11 Same act cannot be punished twice because it violates two or more laws.

(G) Where it is necessary, in proving one offense, to prove every essential element of another, growing out of the same act; conviction of the former is a bar to prosecution for the latter. (U.S.C.C. A Mich.) *Krench v. U.S.*, 42 Fed. (2d) 354, or the offense may not be subject of two prosecutions; where there has been but a single act, one intent, and one violation, *State v. 7 combs*, 34 S. W. (2d) 61.

(H) In the case of *Ballerini v. Aderhold*, 44 Fed. (2d) 352, it was held that separate counts based upon a single sale of heroin charged the "Same offense" as a basis of plea of double jeopardy. It is the law that a single sale of heroin can constitute but one offense, notwithstanding one's failure to register, pay special tax or obtain written order (26 U.S.C.A. No. 691, et seq.)

(I) Now we know that each failure to register, pay special tax, or obtain written order is a violation of a specific statute. Why, then, could they not be added to the punishment of the heroin sale? Because the essential elements in each of them was the same essential elements that brought about the conviction in the first instance—the sale. (By the same logic, shouldn't the same hold true in the forgery, and the Personation, Thompson of the same check, there was but one intent—and there can be but one punishment.)

12 (J) In the case of *Robert Scalfon* the U. S. Supreme Court ruled that a man once acquitted of conspiracy to commit an offense, cannot be convicted later of committing the offense itself, if the main facts alleged in the two cases are the same.

(K) A person, tried and convicted of a crime which has various incidents in it cannot be a second time tried and convicted for one of those incidents without being put twice in jeopardy for the same offense. *Ex Part Neilson*, 181 U.S. 176, 336. Ed. 118, P. 122; *Cain v. U.S.*, 19 F. (2d) 472; *Howitt v. U.S.*, 110 F. (2d) 1; *In re Snow* 120 U.S. 274, 30 L. Ed. 658; *Copperthwaite v. U.S.*, 37 F. (2d) 846; *Bertach v. Snook*, 36 F. (2d) 155; *Pringle v. U.S.*, 128 F. (2d) 736; and *Dimenza v. Johnston*, 130 F. (2d) 465 directly uphold the reasoning of petitioner.

#### CONCLUSION.

For the foregoing reasons defendant respectfully submit that the judgments herein should be vacate and to grant a new trial.

## PRAYER.

Wherefore: Premises, the defendant herein respectfully prays the following:

That this Honorable Court permit the defendant herein to file this amendment to his motion to vacate judgment and sentence and to grant a new trial.

Respectfully submitted,

HERMAN HAYMAN

Herman Hayman, Defendant  
United States Penitentiary  
McNeil Island, Washington.

13. *Duly sworn to by Herman Hayman. Jurat omitted in printing.*

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION.

No. 19036-Cr.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HERMAN HAYMAN, *Defendant.***Findings of Fact, Conclusions of Law, and Order on Motions  
Pursuant to 28 U.S.C. §2255.—Filed June 9, 1949.**

The motions of the defendant filed May 11, 1949, and the amendment thereto filed June 8, 1949, to vacate the judgment and sentence imposed January 20, 1947, for the offenses charged in Counts One, Two, Three, Four, Five and Six of the indictment, having come on for hearing and having been heard by the court on May 16, May 19 and June 9, 1949, after notice given to the United States Attorney and without requiring the attendance of the defendant at the hearing, the court now determines the issues and makes the following findings of fact and conclusions of law and order with respect thereto:

**FINDINGS OF FACT.**

It appears from the motions filed by the defendant on May 11, 1949, and the amendment thereto filed June 8, 1949, and from the files and records in this case, and from the evidence adduced upon the hearing of these motions, and the court accordingly finds:

**I.**

That the defendant was taken into custody at Los Angeles, California, by federal officers on November 6, 1946; that complaint was filed before the United States Commissioner at Los Angeles on November 7, 1946; that warrant was thereupon issued by the Commissioner for arrest of the defendant on November 7, 1946; that said warrant of arrest was executed and returned on November 7, 1946, and the defendant was thereafter and on the same day arraigned before the Commissioner at Los Angeles.

**II.**

That on November 20, 1946, an indictment was returned by the Grand Jury and filed in this court, charging the defendant in six counts as follows: Count One charged a violation by the defendant

of 18 U.S.C., §78; Count Two charged a violation by the defendant of 18 U.S.C., §73; Count Three charged a still further violation by the defendant of 18 U.S.C., §73; Count Four charged a still further violation by the defendant of 18 U.S.C., §73; Count Five charged a still further violation by the defendant of 18 U.S.C., §73; and Count Six charged the defendant and others with a violation of 18 U.S.C., §88.

That thereafter and on December 6, 1946, the defendant was regularly arraigned and entered pleas of not guilty of the offenses charged in the six counts of the indictment.

### III.

Thereafter the case was regularly set for trial on January 7, 1947, and on said date was tried before the court without a jury, the defendant having waived trial by jury and having also waived special findings of fact pursuant to Rule 23(e) of the Federal Rules of Criminal Procedure; that upon the conclusion of said trial

16 the court found the defendant guilty on all six counts of the indictment as charged.

### IV.

Thereafter and on January 20, 1947, the defendant appeared with his counsel for sentence; that defendant was then asked whether he had anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court, it was by the court ordered and adjudged that the defendant, having been found guilty of said offenses, be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of ten years in an institution to be selected by the Attorney General of the United States or his authorized representative, and pay to the United States a fine of \$2,000 for the offense charged in Count One of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Two of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Three of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in Count Four of the indictment; and be further imprisoned for a period of ten years, and pay to the United States a fine of \$1,000 for the offense charged in

17 Count Five of the indictment; and it was further ordered and adjudged that the ten-year periods of imprisonment imposed under Count One and Count Two of the indictment shall run consecutively, and that the ten-year periods of imprisonment imposed under Counts Three, Four and Five of the indictment shall

all commence and run concurrently with the ten-year period of imprisonment imposed under Count Two of the indictment, so that the total period of imprisonment shall be twenty years; and it was further ordered that the defendant pay to the United States a fine of \$10,000 for the offense charged in Count Six of the indictment, and that payment of a total fine of \$10,000 shall fully satisfy all fines imposed under Counts One to Six inclusive of the indictment; and it was further ordered that the defendant be further imprisoned until the fine of \$10,000 is paid or he is otherwise discharged as provided by law.

## V.

Thereafter the defendant appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and on November 7, 1947, the aforesaid judgment and sentence was affirmed without opinion (See *Hayman v. United States*, 163 F. (2d) 1018 (1947)).

## VI.

That the Government did not introduce or seek to introduce into evidence at the trial of the defendant any confession or inculpatory statement which may have been made by the defendant to any police officer or other officer of the law, either state or federal. (Cf. *United States v. Bayör, et al.*; 331 U.S. 532, 539-541 (1947).)

## VII.

That the defendant was fully and fairly represented at all stages of the proceedings in this court by counsel of his own selection; that A. P. Entenza, Esquire, a member in good standing of the bar of this court appeared and represented the defendant at arraignment and plea, upon the trial, at the imposition of sentence, and at all other proceedings in this court prior to and including the imposition of sentence on January 20, 1947; that upon all further proceedings in this court and upon his appeal to the United States Circuit Court of Appeals the defendant was represented by Messrs. Walter L. Gordon, Jr., and E. S. Ragland, both of whom are members in good standing of the bar of this court, and were selected by the defendant and regularly substituted by him to serve as counsel for him in the place of A. P. Entenza, Esquire.

## VIII.

In Paragraphs VI and VII of the motions filed May 11, 1949, the defendant alleges:

"VI. The defendant further claims that he was deprived of the right to have the assistance of counsel for his defense, in

that the defendant was not adequately represented by competent counsel, to-wit: On introduction in evidence of one Juanita Jackson, codefendant statements incriminating defendant, attorney for defendant was also Attorney for Codefendant

19 Juanita Jackson, Attorney A. P. Entenza did not tell defendant that he was also defending Juanita Jackson, and defendant had no way of knowing until after his trial was over. Juanita Jackson, Codefendant and government witness accused defendant of guilt, thus creating conflict of interest, is not qualified to give efficient representation to any of such clients, as affecting constitutional right of qualified counsel for accused. U.S.C.A. Conts. Amends. 5, 6. Johnson v. Zerbst, 304 U.S. 458, 461, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357. Wright v. Johnston, Warden, 77 F. Supp. 687.

"VII. That the defendant herein was deprived of the right to have the assistance of counsel for his defense, in that the defendant was not adequately represented by competent counsel, to-wit: that the defendant, an ignorant layman, had no knowledge of law or legal procedure; that upon imposition of the twenty year's sentence, he vigorously protested his innocence, that the foregoing facts and averments were not fully known to this court, and the defendant herein was unable to bring such facts to the attention of this court, and which, if known to this court would have resulted in a different Judgment."

The court finds that neither the defendant nor Messrs. Gordon and Ragland, as successor counsel to A. P. Entenza, Esquire, ever made any suggestion of complaint in this court prior to the 20 filing of these motions by defendant on May 11, 1949, that the defendant was not fully and adequately and competently represented by A. P. Entenza, Esquire throughout the trial and at the imposition of sentence.

That the person named Juanita T. Jackson, referred to by the defendant, was named a defendant in two indictments filed in this court on December 4, 1946; one of which, being indictment No. 19064, charged said Juanita T. Jackson with theft of United States mail in violation of 18 U.S.C., §317, and the other, being indictment No. 19065, charged said Juanita T. Jackson with forging and uttering United States Treasurer's checks in violation of 18 U.S.C., §73.

That said Juanita T. Jackson was arraigned and pleaded guilty to certain of the charges on December 9, 1946, and on January 20, 1947 was sentenced in this court to a period of ten years imprisonment for such offenses; that A. P. Entenza, Esquire, appeared as counsel for Juanita T. Jackson in both cases, but did so only with

the knowledge and consent, and at the instance and request of the defendant herein, Herman Hayman.

That the defendant had full and capable assistance of counsel at all times in this court.

## IX.

That all allegations of fact set forth in the motions of defendant and the amendment thereto which are inconsistent with the facts as above stated are hereby found to be untrue.

## CONCLUSIONS OF LAW.

21

### I.

Since no use was made at the trial of any confession or other incriminatory statement which may have been made by the defendant to some officer of the law, state or federal, such statement or confession could not have affected the defendant's conviction; and so the manner in which any such statement may have been procured is immaterial in this case (cf. *United States v. Bayer, et al.*, 331 U.S. 532, 539-541 (1947)).

### II.

The defendant was fully and adequately represented by competent counsel at all stages of all proceedings in this court.

### III.

Count One and Count Two of the indictment charge entirely separate and distinct offenses. Count One charges a violation by the defendant of 18 U.S.C., §78; and Count Two charges a violation by the defendant of 18 U.S.C., §73. A conviction for the offense charged in Count Two required proof of facts not required to establish the offense charged in Count One. (See *Reger v. Hudspeth*, 103 F. (2d) 825, 826, (C.C.A. 10th, 1939) and cases there cited).

### IV.

It is therefore concluded that the motions of the defendant must be denied.

## ORDER.

22 By reason of the foregoing Findings of Fact and Conclusions of law,

IT IS ORDERED that the motions of the defendant, Herman Hayman, filed May 11, 1949, and the amendment thereto filed June 8, 1949, to vacate the judgment and sentence imposed on January 20, 1947, for the offenses charged in Counts One, Two, Three, Four, Five and Six of the indictment, upon all the grounds stated in said

motions and the amendment thereto, be and the same are hereby denied.

IT IS FURTHER ORDERED that the defendant be and is hereby advised that the provisions of §2255 of Title 28 of the United States Code accord with the right of an appeal to the Court of Appeals from this order denying his motions, and the defendant is further informed that Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in part that:

"An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . . When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

IT IS FURTHER ORDERED that the Clerk this day serve copy hereof by United States mail on the defendant, Herman Hayman, (Box P.M.B. No. 19616-M, Steilacoom, Washington).

DONE IN OPEN COURT this 9th day of June, 1949.

W.M. C. MATHEWS,  
*United States District Judge.*

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION.

(Title omitted)

Affidavit to Proceed on Appeal in *Forma Pauperis*.

STATE OF WASHINGTON,

*County of Pierce, ss:*

1. Comes now the defendant, Herman Hayman, and first being duly sworn according to law, deposes and says upon his oath: That he is a citizen of the United States of America by birth and over twenty one (21) years of age; that he is the defendant appellant in the above entitled and numbered criminal cause and he respectfully prays that he be allowed to proceed and prosecute the appeal herein prayed, as a poor person to the United States Circuit Court of Appeals for the Ninth Circuit, to a conclusion of defendants cause of suit or action.
2. That the defendant believes himself entitled to the redress sought to be attained by said motion and such appeal, pursuant to the doctrines enunciated by the circuit court of appeals for the ninth circuit in the case of *Robinson v. Johnston* (1941) 118 Federal (2nd) 998.
3. That the defendant is without money and is unable to pay the cost of said appeal or the print the record therein, or to give security for same: That there is no person interested by contract or otherwise in said appeal or entitled to share in any relief thereunder, who is able to pay or secure said costs; that this affidavit is made for the purpose of availing the defendant of the rights and privileges in such cases provided by section 832 of title 28 of the United States code.
4. That unless the defendant is permitted to proceed in *forma pauperis* for review in the United States Circuit Court of Appeals for the ninth circuit, of the above entitled and numbered criminal cause, he will be utterly unable to rectify the final order of the above named Honorable court.

5. Wherefore, the defendant respectfully prays that he may have to prosecute said appeal in forma pauperis without cost or fee and without giving any security therefore, pursuant to said statute.

Respectfully submitted,

HERMAN HAYMAN  
Herman Hayman, Defendant.

Subscribed and sworn to before me this 29th day of June 1949,  
A.D.

(SEAL OF NOTARY)

FRANK YOUNG.

Filed July 14, 1949.

EDMUND L. SMITH, Clerk  
By Maxine Lewis, Deputy Clerk.

16

UNITED STATES VS. HERMAN HAYMÁN

25.

IN THE DISTRICT COURT OF THE  
UNITED STATES

In and for the Southern District of California.

**Order Re Form Pauper's. July 11, 1949.**

Good cause appearing from the foregoing Affidavit and upon the application of Herman Hayman IT IS HEREBY ORDERED, that the herein may commence and prosecute to conclusion the appeal to the United States Court of Appeals in such suit or action, including all appellate proceedings, without being required to prepay fees or costs or giving security therefor.

Wm. C. MATHEES  
*District Judge.*

July 11, 1949.

(File endorsement omitted)

26 From H. Hayman, June 21, 1949. No. 19616. To.....  
....., 231 U. S. Postoffice & Court House.

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT FO CALIFORNIA  
CENTRAL DIVISION.

(Title omitted)

Notice of Appeal.—Filed June 23, 1949.

To:

The Clerk,  
District Court of the United States  
For the Ninth Circuit.

*Please Take Notice* that the petitioner above-named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the entirety of an order of the District Court of the United States for the Southern District of California entered on the 9th day of June 1949, denying petition for motion to vacate the Judgment and sentence.

HERMAN HAYMAN  
Herman Hayman, Petitioner  
Appellant, Pro Per.

Dated: 21 day of June, 1949.

(File endorsement omitted)

IN THE DISTRICT COURT OF THE  
UNITED STATES  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION.

(Title omitted)

**Defendant's Assignment of Errors and Grounds for Appeal.**

This appeal is prosecuted in the absence of a bill of particulars and the defendant will rely upon the clerk's record, that is upon the indictment and other pleadings and that order and judgment of the trial court, as designated by the defendant's Praecept hereto annexed; and the defendant will rely upon the following assignment of errors for reversal pursuant to the provisions set forth in Criminal Procedure Rule 8 to-wit:

1. That the District court committed reversible error in not vacating the judgment and sentence imposed on count two of the indictment.

The defendant earnestly believes he has a meritorious cause for complaint and that he is entitled to the relief he seeks by motion to vacate judgment and sentence and grounds for new trial; and by appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Therefore the defendant herein earnestly believes the case should be reversed and remanded to the District Court with instructions to grant him a hearing on the subject matter and merits of the motion to vacate judgment and sentence and grounds for a new trial therein, and said District Court having heard said motion to dispose of the cases as due process requires.

Respectfully submitted,

HERMAN HAYMAN  
Herman Hayman, Per Se.

(File endorsement omitted)

29

IN THE DISTRICT COURT OF THE  
UNITED STATES  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION.

(Title omitted)

**Praeclipe—Filed July 8, 1949.**

To the Clerk of the Above Entitled Court

You are hereby requested to make a record to be filed in the United States Circuit Court of Appeals for the Ninth District Pursuant to an appeal in the above entitled and numbered cause and to include in such record the following, to-wit:

1. Affidavit for allowance of appeal in *forma pauperis*.
2. Petition for allowance of appeal in *forma pauperis*.
3. Notice of appeal, grounds for appeal, and date filed.
4. Order allowing appeal in *forma pauperis*.
5. Defendant's verified motion and amendment to vacate judgment and sentence, ect. in No. 19036 Cr.
6. Indictment, Judgment of conviction and sentence in criminal cause No. ....
7. Reporters transcript of the proceedings in criminal cause No. 19036.
8. Assignment of errors, and prayer for reversal.
9. This praecipe and service hereon.

Said record to be prepared as required by law, the Rules of this Court in ~~such~~ cases, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and is to be filed in the office of Paul P. O'Brien, clerk of the said Circuit Court of Appeals at San Francisco, California and in Conformity to the above mentioned Rules and law.

Respectfully submitted,

*Hayman HAYMAN,*  
Herman Hayman, Per Se.

(File endorsement omitted)

31 Clerk's Certificate to foregoing transcript omitted in printing.

20

UNITED STATES VS. HERMAN HAYMAN

32

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

**Order of Submission.—June 11, 1950.**

ORDERED appeal herein submitted on behalf of appellant on brief on file, and argued by Mr. Jack Hildreth, Assistant United States Attorney, counsel for appellee, and submitted to Denman, Stephens and Pope, Circuit Judges, for consideration and decision.

33

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

**Order Directing Filing of Opinion and Filing and Recording of  
Judgment.—Oct. 27, 1950.**

ORDERED that the typewritten opinion of Denman, Chief Judge, and concurring opinion of Stephens, Circuit Judge, and dissenting opinion of Pope, Circuit Judge, this day rendered by this court be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion and concurring opinion rendered.

34 IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.HERMAN HAYMAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 12,297.

Opinion.—Oct. 27, 1950.

On Appeal from the United States District Court for the  
Southern District of California, Central Division.Before: DENMAN, Chief Judge, and STEPHENS and POPE,  
Circuit Judges.

DENMAN, Chief Judge:

This is an appeal from an order denying appellant's motion to set aside the district court's sentence of twenty years' imprisonment on findings of guilt on six counts of an indictment. The order appealed from was made in a proceeding under 28 U.S.C. §2255. Appellant is confined in the federal prison at McNeil Island, Washington. His motion was filed with the clerk of the district court in Los Angeles, California.

Appellant's motion tendered three issues. One required a trial of facts dehors the record of the trial on which he was convicted. As to the other two, I am in agreement with Judge Pope's opinion disposing of them as without merit, as conclusively shown from the files and records of the case. Section 2255, par. 3.

The extended consideration of this opinion deals with two questions:

(A) whether the motion and the proceedings thereunder show that an issue was tendered respecting the denial to the 35 appellant of the effective assistance of counsel, in that his counsel, without appellant's knowledge and consent, was attorney for a prosecution's witness, who was convicted of a crime and waiting sentence thereon, and

(B) whether the motion of Section 2255 made in a court of a district other than that in which the moving prisoner is confined is an "inadequate or ineffective" remedy for the proof of facts dehors the record, showing a wrong done him in his convic-

tion for a crime in a trial in which he did not "enjoy" the effective assistance of counsel of the Sixth Amendment of the Constitution, or which had not accorded him the due process of the Fifth Amendment.

Such an extended consideration is necessary. Since under (A) it appears that such an issue was tendered and under (B) that the Section 2255 motion is inadequate and ineffective, for this court to affirm the judgment appealed from would require us to ignore the claimed infringement of a fundamental constitutional right. A reversal would return his case to a court which, as later shown, had not the power to give due process in the consideration of the issue tendered, nor the prompt consideration necessary in a proceeding in the nature of a habeas corpus. Hence dismissal is the proper remedy to free him to apply for his writ of habeas corpus.

It is not questioned that the appellant is a layman, not versed in the law here involved. Appellant did not appear and had no counsel either here or below. The question of "inadequacy and ineffectiveness" of the remedy he invoked was not appreciated by him and it was raised by this court *sua sponte* at the hearing before it, and there argued. Where error of a fundamental nature is concerned, this court may properly notice it even though not assigned. *Sibbach v. Wilson*, 312 U. S. 1, 16. This is a true *a fortiori* in litigation involving Section 2255, an attempted substitute for a habeas corpus proceeding.

This opinion does no more than construe that statute. It does not determine its constitutionality. However, were we to hold it to violate the Constitution, it is within our power, and we should exercise it in this case involving a man's liberty. This pro-

36. proceeding, brought by such a layman, differs from cases involving mere property rights such as those discussed in *Ashwander v. T.V.A.*, 297 U. S. 288, 348, where the Supreme Court, although recognizing its power to do so, refused to consider the constitutionality of a statute which had been invoked in favor of the party later challenging it.

*A. The motion properly tendered the issue that appellant was convicted in a trial in which he did not enjoy the effective assistance of counsel.*

The pertinent portion of the motion reads:

"The defendant further claims that he was deprived of the right to have the assistance of counsel for his defense, in that the defendant was not adequately represented by competent counsel, to-wit: On introduction in evidence of one Juanita Jackson, codefendant statements incriminating defendant, attorney for defendant was also attorney for codefendant

'Juanita Jackson,' attorney [for defendant] did not tell defendant that he was also defending Juanita Jackson, and defendant had no way of knowing until after his trial was over. Juanita Jackson, codefendant, and government witness, accused defendant of guilt, thus creating conflict of interest, is not 'qualified' to give efficient representation to any of such clients, as affecting constitutional right of qualified counsel for accused. U.S.C.A. Const. Amends. 5, 6. *Johnson v. Zerbst*, 304 U. S. 458, 461, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357. *Wright v. Johnston, Warden*, 77 F. Supp. 687.'

The motion also sought a writ of habeas corpus to bring appellant from MeNeil Island, Washington, to Los Angeles, California, for the trial.

With no more before it than the motion, the district court, following the proceeding of the third paragraph of Section 2255,<sup>1</sup> 37 notified the United States Attorney of a hearing thereon, without advising appellant of its date or even that there was to be a hearing, and appointing no counsel to represent him. It was admitted by the government's attorney at the hearing here that the court, in an extended hearing before it, taking three trial days, received the evidence of the government witnesses who testified to the court, among them the United States Attorney and appellant's attorney. In considering the motion and taking evidence thereon, the court recognized the rule that *in such a proceeding a layman's pleading should be literally construed*. *Holiday v. Johnston*, 313 U. S. 342, 350.

On consideration of the evidence adduced at the three-day trial, the court found that on December 9, 1946, Juanita Jackson, though not a defendant with appellant, had pleaded guilty before a different judge to violating the same statute as appellant, and was awaiting sentence thereon when appellant was tried on the succeeding January 7, 1947; that while so awaiting sentence Juanita Jackson was represented by the same attorney who represented appellant at his trial, and that the government offered her

<sup>1</sup> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. (Emphasis supplied.)

as a witness against this attorney's other client, the appellant. Appellant was found guilty on January 7, 1947, and on January 20, 1947, sentences were imposed on both Juanita Jackson and appellant.

The transcript of the trial upon which appellant was convicted was before the lower court and is before us in the appeal taken here. *Hayman v. United States*, 163 F. 2d 1018, *Kelly v. Johnston*, 111 F. 2d 613, 614 (Cir. 9); *Crusciolo v. Atlas Co.*, 84 F. 2d 273, 275 (Cir. 9). It appears that the prosecution in its opening statement disclosed that it proposed to offer Juanita Jackson as a witness against appellant. Appellant's attorney thus knew before any testimony was offered that his client Juanita Jackson, so convicted and awaiting sentence, was to be a witness against his client the appellant.

38 The transcript further shows that in appellant's attorney's cross-examination of Juanita Jackson he failed to ask her whether she, a government witness, had been recently convicted and was awaiting sentence, and this fact was nowhere disclosed on the trial either by the prosecution or by appellant's attorney, though he was careful to do so with another woman witness for the prosecution. Appellant's attorney put appellant on the stand and his questioning brought a denial by appellant of substantially all the statements of Juanita Jackson and another woman adverse to him. In effect, his testimony is that he was framed by Jackson and others.<sup>1a</sup> As in *Wright v. Johnston*, 77 Supp. 687, appellant's attorney was not in a position to argue that "my convicted client Jackson, for whom I am soon to plead for an amelioration of her sentence, is a monumental liar seeking to convict my honest and innocent client Hayman."

These facts disclose a conflict of interests similar to that considered in *Glasser v. United States*, 315 U. S. 60, 70; *Wright v. Johnston*, supra, and like that in *Johnson v. Zerbst*, 304 U. S. 458, 461. Were it not so clear, the language of the Glasser case, supra, at page 75, is applicable:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The

<sup>1a</sup> It is not for us to consider whether these witnesses did or did not frame the case against the appellant, however strong the evidence may appear. As stated in *McCandless v. United States*, 298 U. S. 342, 347-348, "an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appeals from the whole record that it was not prejudicial." Where the error is prejudicial, we cannot ignore it because from the "dead record" guilt is otherwise proved. *Boltenbach v. United States*, 326 U. S. 607, 615. These were jury cases, but here the trial judge was ignorant of the dual representation and is in the same position as a jury.

right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

39 The district court, in the instant proceeding, recognized this inconsistency but made a further finding that appellant's attorney represented his client Jackson "with the knowledge and consent and at the instance and request of the defendant herein, Herman Hayman." This finding was made through the absent appellant was an essential witness in the trial of the question of his "knowledge and consent," and should have been given the opportunity to cross-examine the witnesses against him.

In the Glasser case, *supra*, unlike the present case, the trial judge appointed the attorney representing the adverse interests. However, the Sixth Amendment does not restrict the right to a deprivation by the judge. The Amendment reads: "In all criminal prosecutions the accused shall *enjoy* the right . . . to have the assistance of Counsel for his defense." (Emphasis supplied.) Hayman's motion shows he did not "enjoy" the right here, nor was he given any opportunity to prove that he waived its enjoyment.

If, unknown to the court, the accused's counsel were bribed by an enemy of the accused to throw his case and the accused learned of it after conviction, the fact that the court had nothing to do with the wrong done, does not deprive him of his right to the writ.

It is erroneous to contend that the Court of Appeals for the District of Columbia holds that it is only where the court appoints his attorney that the accused may claim that he has not enjoyed the effective assistance of counsel. On the contrary, in *Jones v. Huff*, 152 F. 2d 14, that court reversed the dismissal of an application for a writ of habeas corpus which alleged that the attorney chosen by the convicted man so had conducted the trial that it became a "farce and a mockery of justice." It held that the accused was not given the "effective representation" required for the fair trial of the Fifth Amendment within the broad principles established in the Glasser case and in Mr. Justice Frankfurter's opinion in *Malinski v. New York*, 324 U. S. 401, 416.

In *Walker v. Johnston*, 312 U. S. 275, 286, Walker, as here, was convicted of a federal crime where, he claimed, in the conduct of the trial, he did not have the effective assistance of counsel, and hence the Sixth Amendment was involved. It is held that where *not by the judge*, but "*by the conduct of the district attorney* [an officer of the court] he was deceived and coerced into pleading guilty when his desire was to plead not guilty, or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel [citing Johnson

v. *Zerbst*, 304 U. S. 458], or if he was deceived by the prosecutor into entering a guilty plea, [citing *Mooney v. Holahan*, 294 U. S. 103] he was deprived of a constitutional right.”<sup>2</sup> (Emphasis supplied.)

If it were necessary to trace the deprivation of those rights to action or inaction on the part of the “court,” there is at hand the rule that attorneys are officers of the court. In *Johnson v. Zerbst*, considered infra, it is held that the court is as much composed of its counsel as of its judge. One of the officers composing the court, the United States Attorney, is also of the executive branch of the government, the Department of Justice. As such, it was incumbent, in the circumstances of this case, for those officers to see that the constitutional rights of the accused were either protected or intelligently waived. Cf. *McFarland v. United States*, 150 F. 2d 593, 594. A failure so to do might well be deemed a deprivation, chargeable to the court, of the effective assistance of counsel.

Further, sole reliance need not be placed on the Sixth Amendment. Where the prosecution chooses to utilize as one of its principal witnesses one awaiting sentence, knowing that such witness is represented by counsel who is also counsel for the accused, I think the requirement of the due process clause that the accused shall have a fair trial makes it mandatory that the prosecution inform the trial judge of the situation so that the judge may take appropriate steps to protect the rights of the accused.

Were the question properly before us, we would have to decide whether an attorney could thus represent two such clients, even at the request of one of them. For reasons later stated, I think it is not before us. Sufficient here to state that the motion 41 made under Section 2255 of 28 U.S.C. is what is claimed on its face. That is, it is one upon which the relief “sought herein is to bring to the attention of this Honorable [District] Court facts which were not fully known to this Honorable Court at the time judgment and sentence was entered herein which, if fully known would have resulted in a different verdict and judgment.”

All this three-day trial and its findings of fact and judgment were in the absence of the appellant, who was not notified of the hearing. So far as concerns appellant, he waited in his McNeil Island penitentiary, hearing nothing of his motion until it was decided against him in such an ex parte proceeding.

In *Johnson v. Zerbst*, 304 U. S. 458, 468, the question, as here, was whether Johnson was properly represented by counsel. The

<sup>2</sup> The opinion continues: “The Government’s contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.”

trial court denied habeas corpus on the ground that the application did not show facts which made the trial "void,"—that is to say, on absence of the constitutional jurisdiction to render the judgment. The Supreme Court reversed on the constitutional ground that the trial court, without such representation of the defendant, was without jurisdiction to convict him, saying,

"... If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a *jurisdictional bar* to a valid conviction and sentence depriving him of his life or his liberty. A court's *jurisdiction* at the beginning of trial may be lost 'in the course of the proceedings' due to *failure to complete the court*—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. [citing *Hans Nielsen, Petitioner*, 131 U. S. 176.] A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.' " (Emphasis supplied.)

42 It is arguable that since the Sixth Amendment was adopted in 1791 it at once became tied to the constitutional writ of habeas corpus of Article I, Section 9,—that is to say, the absence of such jurisdiction as a ground for the constitutional writ recognized in *Johnson v. Zerbst* in 1938 existed in 1791. If this argument be correct, the applicant's right to the writ then required no action of Congress such as in the subsequent habeas corpus provisions of the Act of February 5, 1867,<sup>2</sup> and in Section 2255 to make it effective. Nor could any act of Congress diminish that right.

However, assuming that the constitutional right to the writ does not cover the right to counsel of the Sixth Amendment and that the writ on the latter ground could not be granted until the habeas corpus act of 1867, the question remains: Did Congress intend in Section 2255 to wipe out the rights established in *Johnson v. Zerbst*, *supra*, and substitute therefor an *ex parte* proceeding? I prefer to place our decision on the answer to this question.

<sup>2</sup> 14 Stat. 385.

It must be admitted that Section 2255 accomplishes this in cases involving facts dehors the record if we omit its last qualification "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the detention." Just prior to this qualification is the provision that the application for the writ "shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which sentenced him *OR* that such court has denied him relief."<sup>4</sup> (Emphasis supplied.)

It is obvious that if the motion provided in the third paragraph of the section is granted, no application for the writ will be made.

Hence, the alternative, the denial of the motion, shown  
43 as an alternative by the word "or," deprives all the prisoners sentenced by a court of the United States of their right to seek the writ.

That is to say, all the elaborate provisions of the eleven sections 2241 to 2250 and 2253 of Title 28 were not written for any person convicted in a federal court. Can it be that in enacting all these provisions Congress was such an "Indian giver"? <sup>5</sup>

B. *The procedure by motion under Section 2255 is "inadequate and ineffective to test the legality of his detention" where the moving party is confined in a district other than that of his conviction, and the issue tendered requires testimony as to facts not appearing in the record of the proceedings of the trial leading to such conviction.*

I think that as to such tendered issues of fact the motion procedure has such inadequacy and ineffectiveness. The third paragraph provides for a hearing on the issues of fact ex parte the imprisoned man, of which he is given no notice and at which his body need not be produced. This appears from the following provisions of Section 2255:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine

<sup>4</sup> The last paragraph of Section 2255 provides:

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, *OR* that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (Emphasis supplied.)

<sup>5</sup> If the provision could be interpreted to be merely a condition precedent to granting the writ, a matter considered later, the language falls within Mr. Justice Frankfurter's statement in *Sunal v. Large*, 332 U. S. 174, 184, that "it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law. (Emphasis supplied.)

the issues and make findings of fact and conclusions of law with respect thereto."

"A court may entertain and determine such motions without requiring the production of the prisoner at the hearing."

Here is the denial of procedural due process in a case involving liberty, which as well could be a case involving the moving party's life. The only notice of the hearing is to be given to the 44 attorney of his opponent on the motion, the United States, and even if such notice is given to the moving party, what value would it have to a man confined in McNeil Island?

Undoubtedly under Section 2255 the United States, opposing the motion, could produce testimony *viva voce*, as it did. Hence the presence of the applicant was necessary to present and examine his own witnesses and to cross-examine those of the government. In addition he may want to testify himself. Prior to the trial and during it the prisoner, a thousand miles away, cannot seek subpoenas for witnesses to controvert those of the government, if he could guess what the opposing witnesses would say—an ironical situation where under Section 2255 there is to be a "prompt hearing" of the motion.

It may be contended that the provision of Section 2255 that "the court may entertain and determine said motion without requiring the production of the prisoner at the hearing," though negative in character, affirmatively gives the court the power of issuance of its writ of habeas corpus for such production and that it is a reversible abuse of discretion to fail so to bring him over the one thousand miles of travel from the Washington penitentiary to Los Angeles, California. Hence it may be argued that we return the case to the district court for such production of the applicant.

The answer to this is that an order to bring in the prisoner to present his witnesses and conduct his case is itself a writ of habeas corpus. Under Section 2241 the court's writ does not run outside the Southern District of California. The Attorney General is not made a party by Section 2255. Even if he were and could be served with such process, the absence of the prisoner from the district makes the writ unavailing, though in a broad sense the Attorney General has the prisoner in his custody. *Ahrens v. Clark*, 335 U. S. 118, 191. That decision is based in large part upon the expense and difficulty of bringing the prisoner "perhaps thousands of miles from the district court that issued the writ."

It is also apparent that a government subpoena to him to testify would be no substitute for the writ, for he may desire not to testify but to be present solely to present his own witnesses and cross-examine the government's, as in *Mooney v. Holohan*,

45 294 U. S. 103, where the case was one of later discovered subornation of perjury by the prosecution.

It may be suggested that since the *coram nobis* procedure<sup>6</sup> is civil we could return the case to the district court and, ignoring the provision solely for notice to the United States Attorney, attempt to obtain procedural due process by requiring that court to appoint an attorney practicing in that court to represent the prisoner in McNeil Island and have the motion submitted on depositions or affidavits. So to proceed would require us to make the doubtful assumption that in a proceeding which is a substitute for *habeas corpus*, the prisoner could be denied the right to confront the opposing witnesses and to testify *viva voce* on his own behalf.

Such a procedure would require each party to submit interrogatories on the direct and cross and redirect examination of the witnesses. For the Southern California attorney there would be, first, the time consumed in the preliminary correspondence with his client in McNeil Island to discover his client's case, a clumsy process by correspondence, and his witnesses. Then would follow the preparation of the affidavits of the prisoner. When these are served on the United States there would be the time consumed in preparing the cross-interrogatories. Then well could be considered by the court the admissibility of certain of the cross-interrogatories. When decided, they would have to be mailed to the prisoner at McNeil Island. What they adduce will be returned to the Southern California attorney, who well may have further re-direct interrogatories required by the testimony in response to the cross-examination.

Additional similar consumption of time would be certain in the affidavits of other witnesses on behalf of the prisoner. In a matter of life or liberty procedural due process could not require less.

The case would at last have reached the point where the United States could prepare its responsive affidavits. As to each of these there well may be the same extended delays. Then, quite likely, a similar time would elapse for the prisoner's affidavits to meet the government's testimony. If the moving party is entitled to his release, every day of his imprisonment so added to the constitutionally prompt process is robbed from the prisoner's life.

Such a proceeding is an "inadequate and ineffective" substitute for the eleven provisions for the writ itself and would not satisfy even the requirement of the "prompt hearing thereon" of the third paragraph of Section 2255.

<sup>6</sup> Discussed *infra*.

It is thus apparent that Section 2255, when such questions of fact are presented, may be construed as a substitute for the writ only when the court of the prisoner's conviction is of the district where he is confined. It is also apparent that where the motion requires a decision on such facts in the court of a distant district it lacks the effectiveness required by the last clause of the section.

With regard to the motion's other tendered issue, that the sentencing judgment shows *on its face* that two of the sentences imposed are beyond the court's jurisdiction, it well may be argued that it presents a contention for the right to the constitutional writ, which Article I, Section 9 provides cannot be suspended by any act of Congress. The application for the constitutional writ must be presented to a judge or a court having the power to issue it. It is *that* judge or court which must first decide whether the application has allegations warranting the writ's issuance. If it does so direct the court orders the writ to issue and the prisoner to be produced, as was done in 1833 in *Ex Parte Watkins*, 7 Peters 568, 579. That case dealt with the constitutional writ long before the Act of 1867, when the question, as here, was whether the trial court's order gave the jailer jurisdiction to hold the prisoner. Here in Section 2255, by permitting a distant sentencing court so to dispose of the jurisdictional question, where it cannot issue the writ, Congress, it may be contended, is suspending it in violation of the Constitution.

However, if the motion be deemed a sufficient procedure to determine such a question of jurisdiction shown in the judgment roll, a further question arises. This is whether, since we have decided that the appellant has the right to file his writ of habeas

47 corpus involving such questions of fact in the district court of the district wherein he is confined, we are required to consider on this appeal from the motion the questions of law decided by the court below. To do so means that Congress intended that there should be two proceedings for an imprisoned man having both questions of law and questions of fact such as here presented, one in the court of sentence outside the district of confinement and the other in a court of the district where he is confined.

We know that Congress enacted Section 2255 to relieve the courts of the heavy burden of the great number of habeas corpus applications annually filed, referred to by the Supreme Court in *Price v. Johnston*, 334 U. S. 266, 293, and cases there cited. A construction, placing the judicial burden on issues of fact in the district of the imprisoned man, would severely increase that burden in all cases also presenting other issues of law if we held the motion of Section 2255 to be validly exercised by the sentencing court on the law issues. I think that such doubling of the judi-

cial tribunals also lacks the effectiveness required by the last clause of the section.

Even if the last paragraph of Section 2255 were susceptible of the construction that one is entitled to seek the writ though the motion be denied,<sup>7</sup> it is apparent that the period of delay during which the motion is tried and, on denial, during the appeal provided in the sixth paragraph of the section, a step necessary to complete the judicial process, will cover months of litigation.

48 This is shown in the time consumed in disposing of scores of such motions already considered by the federal courts,<sup>8</sup> whose volume discloses that Section 2255 has brought little, if any, relief of the judicial burden of considering the great numbers of applications for the writ annually made.

One of the prime essentials of the imprisoned man to his right to seek the writ of habeas corpus is the prompt consideration of his application. Every day of wrongful imprisonment is that much taken from the free life of the prisoner.

In determining the essential requirements of the writ of habeas corpus as with other essential provisions of the Constitution, we are required to examine the English law as it was in 1789. As stated in 1807 by Chief Justice Marshall in *Ex Parte Bollman*, 4 *Craunch* 75, 94, "for the meaning of the term habeas corpus resort unquestionably may be had to the common law."

Thus the act of the 31 Car. II, c. 2 (1679), is to be examined for the character of the relief granted by this high prerogative writ. 10 *Halsbury's Laws of England*, 57 (1909 ed.) states that its preamble

"recited that great delays had been used in making returns to writs of habeas corpus in criminal or supposed criminal cases. To remedy this s. 1 of the statute enacted that in such cases the return should be made within three days after the service of the writ if the place where the prisoner is detained

<sup>7</sup> Judge Huxman in his dissent in *Barret v. Hunter*, 180 F. 2d 510 (Cir. 10), a case hereafter considered, states that "The following cases seem to hold that compliance with the section is a prerequisite: *Wong v. Vogel*, 80 Fed. Supp. 723; *Stidham v. Swope*, 82 Fed. Supp. 931; *U. S. v. Calp*, 83 Fed. Supp. 152; *St. Clair v. Hiatt*, 83 Fed. Supp. 585; *Burchfield v. Hiatt*, 86 Fed. Supp. 18; *Fugate v. Hiatt*, 86 Fed. Supp. 22; *Parker v. Hiatt*, 86 Fed. Supp. 27; *Mugavero v. Swope*, 86 Fed. Supp. 45.

<sup>8</sup> The following cases seem to hold that it is a substitute remedy for habeas corpus: *Taylor v. U. S.*, 177 Fed. 2d 194; *Birch v. U. S.*, 173 Fed. 2d 316; *Howell v. U. S.*, 172 Fed. 2d 213; *United States v. Meyers*, 84 Fed. Supp. 766; *United States v. Lowery*, 84 Fed. Supp. 804. Remark: In a number of the cases the court's pronouncement is in the form of dicta and is of value only as it shows the inclination of the court.

<sup>9</sup> Typical of these are *Adelman v. United States*, 174 F. 2d 283 (Cir. 9), six months; *Davis v. United States*, 175 F. 2d 19 (Cir. 9), nine months; *Byers v. United States*, 175 F. 2d 654 (Cir. 10), six months; *Crowe v. United States*, 175 F. 2d 799 (Cir. 4), four months.

is within twenty miles from the court, and if beyond the distance of twenty miles and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after the delivery of the writ, and not longer . . . .

Congress embodied this constitutional requirement of celerity in its Act of February 5, 1867, and codified it in Section 756 of the Revised Statutes by providing "Any person to whom such writ [of habeas corpus] is directed shall make due return thereof within three days thereafter, unless the party be detained 49 beyond the distance of twenty miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days."

Of this the Supreme Court in *Ex Parte Baez*, 177 U. S. 378, 388, said "This section was taken almost literally from the Habeas Corpus Act, chap. 2 of the 31st Car. II, which was designed to remedy procrastination and trifling with the writ." The 31 Car. II provision is again codified in 28 U.S.C. 2243 providing that the writ shall be granted "forthwith" and that it "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed."

Clearly, if a necessary condition precedent to an application for the writ, Section 2255 destroys the application's immediate and forthwith consideration required by the Constitution and the laws and decisions interpreting it. A further absurdity is that Section 2255 is described by the revisers of Title 28 as one which "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*."<sup>9</sup> The motion's decision adverse to the prisoner, unlike habeas corpus, is res judicata of the issues presented. *Waley v. Johnston*, 316 U. S. 101, 105; *Robinson v. Johnston*, 118 F. 2d 998, 1000 (Cir. 9). When, after such months of delay, the application for the writ is presented, the warden will have it denied because the issues presented have been decided against the applicant in the 2255 proceeding!

If, on the other hand, we could treat the decision on such issues of fact as not res judicata because *ex parte* and as a mere preliminary to the application for the writ, the judicial burden in such proceedings would be doubled by Section 2255, instead of giving the relief to the courts which Congress was seeking.

In *Barrett V. Hunter*, 180 F. 2d 510 (Cir. 10), Section 2255 is held valid on the assumption that the court in a district other than the one of the prisoner's incarceration has the power to bring

<sup>9</sup> Reviser's Note, 28 U.S.C. following Section 2255.

the prisoner's body before it. The opinion does not consider such cases as *Ahrens v. Clark*, discussed above, where the 50 writ is held not to run outside the district of the prisoner's confinement. I cannot agree with the decision's statement on page 514 that "where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the Court should require the production of the prisoner." Even in the cases in which the motion is made in the district where the prisoner is confined, it is my opinion that wherever evidence of new facts is to be presented, the requirement of appearance is a right of the prisoner and not subject to the court's discretion. The dissent of Circuit Judge Huxman at page 516 is closely in accord with the view I here take of Section 2255.

There are cases in other circuits which hold contra to the above view of Section 2255, such as *Croice v. United States*, 175 F. 2d 799 (Cir. 4). Here exist the opposing decisions of circuits referred to in Supreme Court Rule 38, para. 5(b).

I am inclined to agree with Judge Stephens' opinion for a reversal on the ground that Section 2255 is unconstitutional in its entirety.

However, I think we are required to dispose of the appeal without determining such a constitutional question, since the decision may be disposed of on words of the statute which present a non-constitutional ground. Cf. *Ashwander v. Valley Authority*, 297 U. S. 288, 347.

It well may be that, in a case where the motion to the court of a district in which the prisoner is not confined is solely on questions of law, the provision that he may not be brought before the court is not unconstitutional. The third paragraph of Section 2255 may be construed as requiring notice to the prisoner in such law cases, despite the absence of such a specific provision.

On this the dictum of the Supreme Court in *Johnson v. Eisentrager*, 339 U. S. 763, should be reconsidered. At page 778 the Court, in a footnote, recognizes the provision of Section 2243, stating:

51 "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." (Emphasis supplied.)

As seen, this opinion, while stating the possible unconstitutionality of Section 2255 where the motion is confined to questions of law, is grounded on its "inadequacy and ineffectiveness" where the motion tenders both an issue of fact and one of law.

In view of Judge Stephens' concurrence in the result, the judgment is reversed and the motion below is ordered dismissed.

**STEPHENS, Circuit Judge, concurring:**

I, too, think the judgment should be reversed and dismissed but I view the case somewhat differently from the view expressed by the Chief Judge in his opinion.

It is my conviction that Section 2255 of the revised Judicial Code (Title 28, U.S.C.A.) cuts to the very heart of the constitutional writ of habeas corpus as it applies to prisoners who are confined under federal convictions. It is true that the writ has been seriously abused but a lethal remedy is neither valid nor justifiable. Courts have gone a long way to stop abuses through causeless, scandalous or repetitious petitions for the issuance of the writ of habeas corpus, and the new Judicial Code, excluding Section 2255, goes further to the same end. It seems to me that it is quite unfortunate and unnecessary that the chapter in the Judicial Code which is devoted to habeas corpus should contain a section which, on its face, nullifies much of it. It is nothing new that executive and legislative and some judicial impatience with the writ has led to attempts to emasculate it. Fortunately they have failed. Now in an attempt to enlarge the trial court's right to correct certain faulty phases of the sentence meted out to one under federal court conviction, it is attempted by Section 2255 to authorize a court hearing that leads to a judgment upon the prisoner's fundamental rights without notice to him, in his absence, in the absence of his counsel and with the prosecutor participating. The Chief Judge treats this phase of the case admirably in greater detail.

52 It will be noticed that the section under consideration begins with a paragraph which authorizes a motion to correct an erroneous sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time. • • • It is well down in the next following paragraph that the judgment

is first mentioned and thereafter the scope of the section is expanded to embrace practically the whole field of habeas corpus within the area of federal court convictions:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the *judgment* was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate. \* \* \* (Emphasis supplied.)

It is readily seen that the scope of the section goes far beyond the recital in the first paragraph as to its purpose and clearly becomes a proceeding largely displacing the writ as a proceeding open to prisoners under federal court convictions. True, the section

53 requires the motion as a precedent to the use of the writ but this does not validate it and it is not an alternative choice to the use of the writ for, while the first paragraph of the section is worded as permissive (the prisoner "may move the court"), the concluding paragraph (about to be quoted) specifically denies his right to have his writ of habeas corpus entertained if he has failed to act by motion "or that such court has denied him relief":

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall *not be entertained* if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (Emphasis supplied.)

Intervening parts of the section are:

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus."

The clause in the concluding paragraph, "or such court has denied him relief," upon close study of the whole section appears little less than a cruel lure for, after an adverse "judgment" on the motion, the movant is by no means free to exercise his constitutional right to the writ of habeas corpus whereby a speedy determination may be had under the safeguards we term "due process." When the litigation under the motion provided for finally ends, he is faced with a judgment which would seem to be res judicata of the issues litigated. If not res judicata the judgment would be practically conclusive upon a court subsequently entertaining a petition for the writ. In my opinion it comes down to the bare facts that the use of habeas corpus has been suspended during the litigation under the motion and 54 practically denied for all time to a prisoner who has grasped the only remedy open to him under the terms of the section.

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Sec. 9, Cl. 2, Art. I, United States Constitution.

Up to now I have purposely refrained from considering and I have said nothing about the concluding or saving clause of the section. If the prisoner has not acted under the section or the court has denied him relief, a petition for the writ shall not be entertained \*\*\* unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The Chief Judge, if I understand his opinion, bases his proposed decision upon the ground that by reason of the lack of due process having been denied Hayman in the circumstances obtaining, the section is inadequate and ineffective and therefore does not apply to him. I readily concur in the conclusion that the judgment must be reversed and the motion dismissed. But I think there is lack of due process with or without the saving clause. If there is lack of due process inherent in the proceeding provided by the section, it applies to every hearing under the section and every judgment under it would be fatally defective. The authors did not visualize any defect in the process and though, of course, the section was entirely adequate and effective. The

saving clause in my opinion was added to cover exceptional circumstances. One exceptional circumstance might be that a prisoner would be executed before the due course of the motion could run to a decision. Other examples could be conjured up.

To state it another way, I would see nothing inadequate or ineffective in the Act if a free choice were left to the prisoner to proceed under the motion or by petition for the writ of habeas corpus. If he chose to proceed under the motion, with all of its restrictions, there would be nothing to interfere with the adequacy or effectiveness of such a test as to "the legality of his detention."

But a free choice is not open to him, (except in unusual circumstances which do not obtain here), his case must proceed 55 under the motion through the one-sided hearing and ordinary appeal. When the judgment is at last final, it is practically if not technically res judicata, and the issues have been determined under the harsh restrictions provided in Section 2255. Even if he finally wins his relief, it is after long litigation not required to be placed ahead of other litigation during which his rights to the benefits of the writ of habeas corpus have been suspended.

I am sure that it is always the duty of the judge—both trial and appellate—to see to it that fundamental rights touching any person's right to freedom are protected and preserved and that such duty cannot be absolved by strict legalism. Appellant in this case has not raised the points I have considered but I think this court would be remiss if, for that reason, it gave them no heed but should affirm the judgment, thereby allowing it to stand as a practical bar to the classical method of trying vital issues.

I think the section cannot be construed so as to avoid the fatal vice of suspending and, for all intents and purposes, of denying the writ of habeas corpus to appellant Hayman and that this court has the duty of declaring the judgment herein a nullity.

**POPE, Circuit Judge, dissenting:**

I think that the questions discussed in the opinions of Judge Denman and of Judge Stephens are of much interest, so far as the abstract propositions stated by them are concerned. No doubt at some future time this court will be required to decide these matters.

But I think none of these questions are before us in this case. The discussion by Judge Stephens of the academic question as to whether the last paragraph of section 2255, in making the motion authorized by this section a condition precedent to a substitute for an application for a writ of habeas corpus, is invalid at-

tempt to suspend the writ, is interesting, but not appropriate here. For this appellant is not one who has sought habeas corpus and been denied relief because of the prohibitions of this paragraph. Were he in that situation he would be in a position to raise these questions. Such were *Barrett v. Hunter*, (10 Cir.), 180 F. 2d 510, and *Martin v. Hiatt*, (5 Cir.), 174 F. 2d 350. Appellant entered the court below expressly seeking the benefits of the section. He obtained the re-examination of the record which section 2255 called for. As I shall show he was not entitled to more.

Insofar as it is based on constitutional grounds, the argument runs afoul not only of the rule that a court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," but also of the rule that a court "will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Ashwander v. Valley Authority*, 297 U. S. 288, at 346.

Judge Denman also finds difficulty in reconciling section 2255 with constitutional limitations. This he resolves by holding the procedure authorized by the section "inadequate or ineffective" to deal with appellant's motion, and that therefore the judgment must be reversed. As I think the determination of the district court was right, and that it reached the only possible result, I think the order should be affirmed.

Appellant came forward with a motion which showed on its face that he was entitled to no relief. These are his complaints:

(1) That "he was arrested without a warrant, and questioned for five days before he . . . was taken before a committing magistrate." There is no claim that any confession or admission made during these five days was offered or received in evidence.<sup>1</sup>

(2) That he was subjected to double jeopardy, in that several of the different counts of the indictment charged the same offense. The motion does not favor us with a statement as to whether his sentences were all concurrent. But the motion shows that count one charged violation of section 78, and count two charged violation of section 63, of Title 18. The district court's findings clarify the record for us, and show that "a conviction for the offense charged in count two required proof of facts not required to establish the offense charged in count one." The sentences under these two counts were made to run consecutively. Those under all other counts were to be served concurrently with that under count two, and hence there is no basis for complaint here. *Sinclair v. United States*, 279 U. S. 263, 299.

<sup>1</sup> And therefore he has no complaint under the rule in the *McNabb* case. *Townsend v. Burke*, 334 U. S. 736, 738; *Wheeler v. United States*, (C.A.D.C.) 165 F. 2d 225, 231.

(3) That he was deprived of the assistance of counsel in that "codefendant Juanita Jackson," who testified against him, was represented by his attorney, who did not tell appellant he was also defending Juanita Jackson, "thus creating conflict of interest." (There was no "codefendant." He was the sole defendant.)

I cannot agree with Judge Denman's conclusion that this allegation about his lawyer showed appellant was deprived of a constitutional right. The lawyer was chosen by himself, not by the court. Presumably he was the one person best prepared to try the case. I assume that Juanita Jackson, having pleaded guilty, hoped to gain favor by her testimony against appellant. It seems to be suggested here that it was the duty of the attorney to withdraw as counsel the moment he knew this witness would be called. I think it a purely imaginary assumption that he would not cross-examine Jackson as well as might some other lawyer. But, even indulging that assumption, and assuming that a court, either proceeding under Section 2255, or under a petition for a writ of habeas corpus, could conclude that the attorney in not informing appellant of his prior representation of Juanita Jackson, or in not withdrawing from the case notwithstanding his general preparation to try it, was guilty of fraud and misconduct, what of it?

Are we now to add to all the other grounds for collateral attack upon a judgment of conviction that the accused's attorney failed, at some point in the trial, to take the right turn, or failed to inform the client of some fact in the lawyer's experience, which, if known to the client, might have led to some other choice of counsel?<sup>2</sup>

<sup>2</sup> *Diggs v. Welch*, (C.A.D.C.) 148 F. 2d 667, 669: "The result of such an interpretation would be to give any Federal prisoner a hearing after his conviction in order to air his charges against the attorney who formerly represented him. It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear." "For these reasons we think absence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it. . . . They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."

58 In dealing with the court a lawyer must conduct himself as an officer of the court, but that he is thus referred to does not make him an arm of government to which constitutional limitations are addressed.<sup>3</sup>

59 The suggestion that the prosecutor should have suspected appellant's attorney of improperly assuming a dual role, and have called it to the attention of the court, I think wholly without substance. A comparison of such a situation with that where the prosecutor's conduct is such that the accused "was deceived and coerced into pleading guilty," (*Walker v. Johnston*, 312 U. S. 275, 286), or where the Government "knowingly employed false testimony," (*Mooney v. Holohan*, 294 U. S. 103, 113; *Price v. Johnston*, 334 U. S. 266, 275), is, as I see it, too farfetched to be realistic.

In the case of *Dorsey v. Gill*, *supra*, note 2, the prisoner claimed that he pleaded guilty because of a misrepresentation of fact made to him by his attorney. The court held the allegation insufficient, citing *Diggs v. Welch*, *supra*, note 2, as authority. Here there is nothing startling, or even unusual, about an attorney representing each of two alleged accomplices. The gist of appellant's complaint is that his attorney failed to tell him about representing Jackson. But here there was no such "farce and mockery of justice" as must

*Alred v. United States*, (4 Cir.) 177 F. 2d 193; "He may not have the sentences entered against him set aside and his case tried over by claiming that the attorney whom he selected did not properly represent him."

See also *Dorsey v. Gill*, (C.A.D.C.) 148 F. 2d 857, 875; *Hudspeth v. McDonald*, (10 Cir.) 120 F. 2d 962, 968; *Merritt v. Hunter*, (10 Cir.) 170 F. 2d 739, 741.

<sup>3</sup> Note that in the Glasser case, (315 U.S. 60), the court characterized what it there disapproved as action of the court. See particularly, pp. 70 and 71: "A federal court cannot constitutionally drive an accused . . . of the assistance of counsel." . . . . . the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." Also on p. 71: ". . . the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights." (Emphasis supplied) In *Mooney v. Holohan*, 294 U.S. 103, 113, the court speaks of the impact of the Fourteenth Amendment, there involved, as follows: "That amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.'"

It is this carefully observed distinction which accounts for the statement of the rule in the case of *Diggs v. Welch*, *supra*, note 2, that misconduct of an attorney does not amount to absence of effective representation of counsel within the meaning of the Sixth Amendment except in the extreme case where the representation was "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it," and where it "shocked the conscience of the court and made the proceedings a farce and a mockery of justice." (Emphasis added). This statement of the rule has been repeated by the same court in *Dorsey v. Gill*, *supra*, note 2, and in *Jones v. Huff*, 152 F. 2d 14, and by the Court of Appeals for the Second Circuit in *United States v. Wight*, 176 F. 2d 376, 379.

have "shocked the conscience of the court." In fact, neither the court nor the prosecutor could have been aware of any irregularity. Much less could it be said that the representation was "so lacking in competence" that it was "the duty of the court or the prosecution to observe it and to correct it." The facts here have no resemblance to those in *Jones v. Huff*, 152 F. 2d 14, which presented the extraordinary case mentioned in *Diggs v. Welch, supra*.

One must wonder what appellant would have had to say if, on first learning that Juanita Jackson would be called as a witness, his attorney had stood up and asked to be discharged, or 60 if the United States Attorney had then suggested to the court that he do so.<sup>4</sup>

In my opinion all that the trial judge could possibly do with this motion was to lay it alongside the indictment and the judgment, and these papers would "conclusively show that the prisoner is entitled to no relief." The motion was not sufficient to take the court beyond this first clause in the third paragraph in the section. That he unnecessarily took testimony is immaterial. Since the motion was groundless, the court could properly dismiss it.<sup>5</sup>

I think the order should be affirmed.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion Filed Oct. 27, 1950. Paul P. O'Brien, Clerk.

(Concurring opinion amended by order of February 27, 1951.)

<sup>4</sup> If we are permitted, as Judge Denman undertakes to do, to examine the record on another appeal for the purpose of discovering what happened at appellant's trial, we will discover some interesting circumstances. It was shown by testimony of numbers of witnesses, wholly apart from the Witness Jackson, that appellant was engaged in systematically purloining from the mail boxes where they had been delivered, government checks, chiefly those for veterans and for soldiers' family allowances. He had thus stolen, forged and cashed a great number of such checks, and was therefore doubtless well advised to waive a jury, as he did. Since a jury was not present it was unnecessary for Hayman's counsel to cross-examine Jackson as to her motives,—the experienced trial judge who heard the case knew as well as anyone, and without any such cross-examination, the caution which he must exercise in considering the testimony of this accomplice. I find nothing in the record to lend any support to a claimed lack of effective representation by counsel.

<sup>5</sup> Cf. *Walker v. Johnston*, 312 U.S. 275, 284: "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it."

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 12297.

HERMAN HAYMAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Judgment.—Oct. 27, 1950.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and the motion below is ordered dismissed.

(ENDORSED) Judgment

Filed and entered October 27, 1951,

PAUL P. O'BRIEN, Clerk.

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**Order Directing Filing of Opinions on Petition for Rehearing and Denying Petition for Rehearing.—Feb. 26, 1951.**

ORDERED that the opinion of this court, this day rendered on petition for rehearing, and dissenting opinion of Pope, Circuit Judge, be forthwith filed by the clerk.

Pursuant thereto, and by direction of the court, IT IS ORDERED that the petition of appellee, filed November 25, 1950, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 12,297, Feb. 26, 1951

HERMAN HAYMAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

## Opinion on Petition for Rehearing.—Feb. 26, 1951.

Before: DENMAN, Chief Judge, and STEPHENS and POPE,  
Circuit Judges.

DENMAN, Chief Judge:

The petition of the United States for rehearing, disagreeing with the dissenting opinion, concedes the validity of the motion's pleading that Hayman has been denied the effective assistance of counsel, for it urges "that the judgment be reversed solely on the ground that a factual issue . . . [the effective assistance of counsel] is raised which requires appellant's presence at the hearing below."

One ground for a rehearing is the difference in views of the opinions of Judge Denman and Judge Stephens. This has been resolved, for, upon further consideration, Judge Denman concurs in a reversal on the ground that Section 2255 is unconstitutional because not a substitute for the writ of habeas corpus and yet denies that writ if the motion is denied.

No legislation states that one wrongfully imprisoned is confined to a single application for a writ of habeas corpus. The Supreme Court in deciding that the wrongfully imprisoned person may make more than one application for the writ on the same issues could not have placed its decision on statutory grounds. It must have done so on the character of the constitutional writ.

Section 2255 grants no such right. Since it is a *coram nobis* proceeding, a prior decision on a prior motion is *res judicata* of a subsequent motion on the same issues. Hence, as the statute states, the court "shall not be required" by the imprisoned man to entertain a second such motion. The "shall" is mandatory. No such discretion is granted the sentencing court, as is given the judge hearing the application for the writ under 28 U.S.C. Section 2244.

In the alternative we are also agreed that in this case, where the issue to be tried is on the facts not known to the court in which the conviction was had and as well and more expeditiously could be tried in a habeas corpus proceeding in the jurisdiction

of confinement, the dismissal is required upon the reasoning of Chief Judge Denman's opinion.

The government's petition's sole remaining contention is that the Section 2255 proceeding is not "inadequate and ineffective to test the legality of the detention," and is a substitute for the writ of habeas corpus because the moving party may make himself a witness in his motion proceeding by use of the writ of habeas corpus *ad testificandum*. Having made himself a witness he is then in court and may prosecute his case, introduce other witnesses and cross-examine those of the government. In other words the writ *ad testificandum* is a substitute for the writ *ad subjiciendum*.

Assuming the government's contention that this writ is an exception to all the others and is not confined to the territorial jurisdiction of the issuing court, this does not make the Section 2255 proceeding the equivalent of one in habeas corpus. The writ *ad testificandum* would not be available to a moving party who does not intend to be or cannot be a witness at the hearing of the motion, but has other witnesses who will prove, say, that he was convicted on perjured testimony procured by the prosecution.<sup>1</sup> His application for the writ *ad testificandum*, in which he swears he desires to testify when he has no such intention, would be based on perjury.

If the government's contention is correct that use of the writ *ad testificandum* makes the Section 2255 proceeding the same as that in habeas corpus, then, in Ahrens v. Clark, 335 U.S. 188, 191, the absurdity could be argued that upon the applicant's filing for the writ of habeas corpus in the District of Columbia, they could be brought there by the writ *ad testificandum* and thus create jurisdiction in the District of Columbia court to prosecute their cause. Having arrived in court as witnesses they then would acquire the right to cross-examine opposing witnesses. We cannot believe that the Supreme Court was of the opinion that the writ *ad testificandum* so could be used.

In the instant case Hayman, if producing himself by the writ *ad testificandum*, would not be in custody of the court as under the writ *ad subjiciendum*. He would be in the custody of the marshal. United States v. Hunter, 162 F. 2d 644 (Cir. 7), and cases there cited. He would have no power to introduce witnesses or cross-examine his opponents, an essential of the "great writ."

Furthermore, there is no merit in the contention of the petition that the writ *ad testificandum* is excluded from 28 U.S.C. Section 2241, which confines the district court's power to issue writs of habeas corpus to that court's territorial jurisdiction.

<sup>1</sup> As in Mooney v. Holahan, 294 U.S. 103.

That section specifically provides for the writ *ad testificandum* in its subsection (e)(5). In this respect the section reads:

"(a) Writs of habeas corpus may be granted by . . . the *district courts* . . . within *their respective jurisdictions* . . .

\* \* \*

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

\* \* \*

"(5) It is necessary to bring him into court to *testify* or for trial." (Emphasis supplied.)

66 The words "to testify" cover the writ *ad testificandum*, which is as much restricted as to jurisdiction as the writ *ad subjiciendum* considered by the Supreme Court in *Ahrens v. Clark*, 335 U.S. 188, 190. In that decision the writ is held to be confined to the district court's territorial jurisdiction, the Court at page 191 giving as one of its reasons for holding that Congress did not contemplate bringing the prisoner "perhaps thousands of miles from the District Court that issued the writ . . . [that the] opportunities of escape afforded by travel, the cost of transportation and the administrative burden of such an undertaking negate such a purpose."

We can conceive of no principle of interpretation which gives the district court extraterritorial jurisdiction for the one writ as distinguished from the other. The expense and difficulty in bringing Hayman the thousand miles from McNeil Island to Los Angeles are the same whether he is brought to testify or to litigate his motion.

Nor is there merit in the contention that pauper Hayman could have himself brought himself by subpoena at *government expense* from McNeil Island to Los Angeles under Criminal Rule 17(b). Such a contention assumes the Section 2255 procedure to be a part of the criminal prosecution in which he was convicted. We do not agree.

The habeas corpus proceeding is civil in nature and Section 2255 as a substitute therefor is phrased to cover the same area of relief. Its order is one from which the appeal time is the longer period of a habeas corpus case than the 10 days for a criminal

judgment, that statute providing that "An appeal may be taken to the court of appeals from an order made on the motion as from a final judgment on application for a writ of habeas corpus." It is a *coram nobis* proceeding independent from the case in which the conviction was had. Like the habeas corpus proceeding, it is civil in its nature. In this we are in agreement with the decision of the Court of Appeals of the District of Columbia, *Bruno v. United States*, 180 F. 2d 393, 395 (C.A.D.C.). A civil subpoena would be valueless to the pauper Hayman to bring either himself or his witnesses to the district court in Los Angeles.

67 The writ of certiorari is required because of the opposing decisions cited in Chief Judge Denman's opinion. The Eighth Circuit, in *Weber v. Steele, Warden*, ....F. 2d....., No. 14,197, decided December 19, 1950, creates a further ground for certiorari. It carries to a logical absurdity the proposition that litigation under Section 2255 is a condition precedent to the right to the writ of habeas corpus. That decision states: "The purpose of Section 2255 was to require a federal prisoner to exhaust his remedies in the courts of the District and Circuit in which he was convicted and sentenced, and to apply to the Supreme Court on certiorari from a denial of such remedies, before seeking release on habeas corpus. This means that he must exhaust all the ordinary remedies available to him before applying for an extraordinary remedy."

That is to say, the right to the writ is "suspended" in violation of the Constitution in any case until from eighteen months to two years after the motion under Section 2255 is filed, a period spent in three successive courts. *By such delay, the prisoner who, as here, may not even know a hearing was to be had on his motion, well may have served the remaining period of an illegal sentence.* This, although the common law, our Habeas Corpus Act of 1867, and now 28 U.S.C. §2243 provide a 3 to 20-day time limit on the warden's return.

Since our opinions were filed, the motions under the statute have continued to mount. The purpose of its enactment is said to be to relieve the district judges of the multiplicity of applications for the writ. It seems that Chief Judge Parker is disappointed in his prognosis in 8 F.R.D. 178, that "The provisions of the Revised Code preserved everything of importance in that procedure while *eliminating the abuses* to which it has given birth." (Emphasis supplied.)

The petition for rehearing is denied.

POPE, Circuit Judge, dissenting:

68 Judge Denman, in his latest opinion, now concurs with Judge Stephens' original opinion, thus making the latter the opinion of the court. I think this decision that §2255 is void in its entirety is most unfortunate. Why it is unwarranted here could not be better stated than in the words of Judge Denman's original opinion: "However, I think we are required to dispose of the appeal without determining such a constitutional question, since the decision may be disposed of on words of the statute which present a non-constitutional ground. Cf. *Ashwander v. Valley Authority*, 297 U.S. 288, 347."

My associates also say that they stand by "the reasoning of Judge Denman's opinion." The results reached in that opinion were predicated upon the validity of Judge Denman's assertion that the presence of the appellant was required, and that there exists no means of procuring it. Portions of the latest opinion are devoted to an attempt to answer the suggestion of the petition for rehearing that the attendance of appellant is available by writ of habeas corpus ad testificandum by citing *Ahrens v. Clark*, 335 U.S. 188. But even if that case controls, which I very much doubt,<sup>1</sup> the matter cannot be disposed of merely by ruling out this particular writ. §2255 itself requires the court to "determine the issues and make findings." In an appropriate case it may "correct the sentence." I think that inherent in this power is the power to require and secure the presence of the prisoner, where necessary.

This sort of thing has been arranged with the greatest of ease since long before any one ever thought of §2255. Even before the adoption of Rule 35 it has been held that "the court may correct an illegal sentence at any time." *De Benque v. United*

69 *States*, (D.C. cir.) 85 F. 2d 202, cited in *Bozza v. United States*, 330 U.S. 160. Surely my associates would not suggest that in a case where sentence must be reimposed, there is no means of doing so if the prisoner happens to be confined at a distance. The present case involves no different problem. It is answered by the fact that in a §2255 proceeding the court has jurisdiction both of the moving party and of the United States which holds him prisoner. Its order for his presence poses

<sup>1</sup> The issuance of a writ of habeas corpus ad testificandum was an inherent power of a court long before the enactment of §2241(b)(5) of Title 28. Its reach should be coterminous with that of the court's subpoena. I think that *Bruno v. United States*, 180 F. 2d 393, is no authority that a subpoena for a witness for the hearing below would not be issued under Criminal Procedure Rule 17(e).

If the Government needed as a witness in a prosecution at Los Angeles a prisoner at Alcatraz, I would think his presence could be procured.

no problem. It is unnecessary to call the order by any particular name, or to denominate it a writ as was done to bring Walter McDonald from Aleatraz to Michigan for resentence (McDonald v. Moinet, (6 cir.) 139 F. 2d 939); or to rely on Title 28, §1651, referring to the power to issue "all writs necessary or appropriate," etc., or to call upon any doctrine of "a writ in the nature of habeas corpus," (Price v. Johnston, 334 U.S. 266, 283). It is simply a matter of common sense that a court required to do a job may make the necessary orders to accomplish it. I think this is implied in Barrett v. Hunter, 180 F. 2d 510, 514, cert. den. 340 U.S. 897.

Not a single proposition in any of the opinions filed was urged by either party. Upon them the United States Attorney has had no opportunity to be heard. Until we have granted such a hearing I think we have not done our best to solve this case, as we should do before we throw up our hands and ask the Supreme Court to grant certiorari, as the majority now do.

The idea behind §2255 has merit. It was drafted after much study of a problem that needed attention. Its sensible procedure should be compared with the Mountain-to-Mahomet procedure of bringing the testimony of a Michigan judge, and other Michigan witnesses to California in response to Walter McDonald's latest habeas corpus petition. (Swope v. McDonald, 173 F. 2d 852, cert. den. 337 U.S. 960).

If there be infirmities in §2255, I think it a matter of considerable importance whether they be of the character and extent stated in Judge Stephens' opinion or whether they be of the character and extent stated in Judge Denman's first opinion. If the latter is the true situation, the objections raised can readily be corrected by a simple amendment, and I think that this court ought not to say that all the labor that has been expanded upon the drafting of §2255 must be committed to the ashen without more thorough opportunity for argument before the court than has yet been afforded.

70 (Endorsed:) Opinion and Dissenting Opinion on Petition for Rehearing. Filed Feb. 26, 1951. Paul P. O'Brien, Clerk.

71 (Clerk's Certificate to foregoing transcript omitted in printing.)

Supreme Court of the United States

October Term, 1950

No. 642

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HERMAN HAYMAN

*Order allowing certiorari*

Filed May 14, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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*Supreme Court of the United States*

OCTOBER TERM ~~1950~~ 51

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UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN HAYMAN

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

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**No. 642**

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**HERMAN HAYMAN**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit reversing the judgment of the District Court for the Southern District of California denying respondent's motion under 28 U. S. C. 2255 (1948 rev.) to vacate a judgment of conviction and sentence previously imposed upon him in that court, and remanding the cause to the District Court with directions to dismiss respondent's motion so as to leave him free to institute a habeas corpus proceeding in the district court for the district in which he is imprisoned.

**OPINIONS BELOW**

The opinions in the Court of Appeals on respondent's appeal (R. 23-43) and on the Government's petition for rehearing (R. 46-51) are not yet reported.

**JURISDICTION**

The judgment of the Court of Appeals was entered on October 27, 1950 (R. 44), and the Government's petition for rehearing was denied on February 26, 1951 (R. 45). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

**QUESTIONS PRESENTED**

1. Whether 28 U. S. C. 2255, which requires a prisoner who wishes to test the legality of his detention under sentence of a federal court to seek relief in the court which imposed the sentence and permits him to apply for a writ of habeas corpus only if the remedy by motion proves inadequate or ineffective, violates Art. 1, Sec. 9, cl. 2 of the Constitution, which prohibits the suspension of the privilege of the writ of habeas corpus except when public safety may require it in cases of rebellion or invasion.
2. Whether Section 2255 provides an adequate remedy for prisoners confined outside the district in which they were tried when the motion filed under Section 2255 raises factual issues requiring a hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED

28 U. S. C. 2255:

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court

shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Art. I, Sec. 9, cl. 2 of the Constitution:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

#### STATEMENT

Respondent is confined in the United States Penitentiary at McNeil Island, within the West-

ern District of Washington, where he is serving a sentence of 20 years; imprisonment imposed, on January 20, 1947, by the District Court for the Southern District of California. On May 11, 1949, he filed a motion in the sentencing court, pursuant to 28 U. S. C. 2255, attacking the validity of his conviction as having been obtained in violation of the Sixth Amendment (R. 1-4). He also moved the court for a writ of habeas corpus to bring him from his place of confinement to Los Angeles, California, to testify as to the facts averred in his motion papers (R. 4). In his motion, as amended June 8, 1949 (R. 5-7), he alleged three grounds in support of the relief claimed (R. 1-3), the third of which (the only allegation involved here (R. 3)) was to the effect "that he was deprived of the right to have the assistance of counsel for his defense" because his attorney, without his knowledge and consent, also represented the "codefendant Juanita Jackson," the prosecution's witness who testified against him, "thus creating conflict of interest." (R. 3.)

The District Court, after notifying the United States Attorney of the date of the hearing, but without similarly advising respondent, conducted a hearing on the motion which lasted three days (R. 8, 24). At this hearing the court "received the evidence of the government witnesses who testified to the court, among them the United States Attorney and the appellant's [trial] attorney" (R. 24). Respondent was not present.

at this hearing, nor was he represented by counsel (R. 8, 24). On the basis of the evidence adduced at the hearing, the court found that on December 9, 1946, Juanita Jackson, though not a defendant with respondent, had pleaded guilty before a different judge to violating the same statute as respondent, and was awaiting sentence thereon when respondent was tried on January 7, 1947 (R. 11, 24). Respondent had engaged an attorney of his own choosing to conduct his defense at the trial, which was without a jury (R. 9-10). His attorney was the same counsel who was representing Jackson while the latter was awaiting sentence (R. 11). The court also found that respondent's attorney represented Jackson "with the knowledge and consent and at the instance and request of the defendant herein, Herman Hayman" (R. 11-12). Sentences were imposed on both respondent and Jackson on January 20, 1947 (R. 9, 11).<sup>1</sup> On the basis of the evidence, the District Court denied respondent's motion to vacate his conviction (R. 12-13).

On respondent's appeal from the order of the District Court denying his motion to vacate his conviction, the Court of Appeals, upon the basis of separate opinions of Chief Judge Denman and Judge Stephens (R. 22-39), reversed the District

<sup>1</sup> Respondent appealed to the Court of Appeals for the Ninth Circuit, which affirmed his conviction in a per curiam order on November 7, 1947. *Hayman v. United States*, 163 F. 2d 1018 (C. A. 9):

Court's order and, *sua sponte*, ordered the dismissal of respondent's motion in order to permit him to file a petition for a writ of habeas corpus (R. 36, 44). Judge Pope dissented; he would have affirmed the District Court's order (R. 39-43).

The opinion of Chief Judge Denman (R. 22-36), after expressing strong doubts as to the constitutionality of Section 2255, found that the motion provided an "inadequate and ineffective" remedy within the meaning of Section 2255 since it afforded respondent no opportunity to prove facts outside the record by which to test the legality of his detention. The opinion reasons that the motion and the proceedings had thereunder showed that, in addition to an issue of law, an issue of fact was tendered with respect to the denial to respondent of effective assistance of counsel, requiring an evidentiary hearing as to facts *dehors* the record of the original trial; that respondent was entitled to be present at this hearing of factual issues; and that since the court of conviction where the motion was made is in a district other than that in which respondent is confined, the court had no power to command the production of the prisoner within its jurisdiction. Chief Judge Denman stated (R. 34-35) that he did not agree with the decision of the Court of Appeals for the Tenth Circuit in *Barrett v. Hunter*, 180 F. 2d 510, certiorari denied, 340 U. S. 897.

Judge Stephens reasoned (R. 36-39) that Section 2255, in requiring a motion thereunder as a condition precedent to an application for a writ of habeas corpus, and making an adverse judgment on such motion, after an *ex parte* hearing, *res judicata*, is unconstitutional because it suspends and, in effect, denies the writ of habeas corpus, in contravention of Art. I, Sec. 9, cl. 2 of the Constitution.

Judge Pope was of the opinion (R. 39-43) that the constitutionality of Section 2255 was not involved, since respondent did not seek relief by habeas corpus and had not been denied such relief because of the prohibitions of the statute. He concluded that, inasmuch as a reexamination of the record by the trial court and an examination of the moving papers "conclusively show that the prisoner is entitled to no relief," it was entirely within the judge's discretion to deny respondent's motion, even without any hearing, *ex parte* or otherwise (R. 43).

In view of the situation created by the divergent views of three of the seven judges of the Ninth Circuit as to an important and recurring question, and the lack of a majority holding, the United States petitioned the court for a rehearing and moved for a reconsideration of the case *en banc* (R. 45). In denying the petition for rehearing, Chief Judge Denman, writing for himself and Judge Stephens, resolved the difference in views between his opinion and that of Judge

Stephens, which was urged as one of the grounds for a rehearing, by stating that each agreed with the reasoning of the other, as an alternative ground for decision.<sup>2</sup> Both judges thereby concurred "in a reversal on the ground that Section 2255 is unconstitutional because not a substitute for the writ of habeas corpus and yet denies that writ if the motion is denied" (R. 46). The opinion on rehearing (R. 46-49) again recognized the conflict with opposing decisions, calling attention to a recent decision of the Court of Appeals for the Eighth Circuit (*Weber v. Steele*, 185 F. 2d 799) as creating "a further ground for certiorari."

Judge Pope again dissented (R. 50-51); he expressed the view that Section 2255 should be construed as empowering a court outside the district of confinement to secure the presence of the prisoner-applicant, and that the section is constitutional.

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that 28 U. S. C. 2255 provides a proceeding which, at best, can afford only a

<sup>2</sup> The opinion erroneously interpreted the Government's suggestion "that the judgment be reversed solely on the ground that a factual issue \* \* \* [the effective assistance of counsel] is raised which requires appellant's presence at the hearing below," as a concession of the validity of respondent's allegation that he had been denied the effective assistance of counsel (R. 46).

hearing *ex parte* to the prosecution and without notice to the prisoner so as to be inherently defective because it denies the movant a fair hearing.

2. In holding that the sentencing court has no power, either impliedly under Section 2255 or expressly under 28 U. S. C. 1651, to issue ancillary process in aid of its jurisdiction so as to command the production of a federal prisoner from a distant district for purposes of a hearing on a motion brought under Section 2255.
3. In holding that Section 2255 is unconstitutional.
4. In ordering the dismissal of respondent's motion under Section 2255, rather than remanding the proceeding to the District Court for a hearing on the merits with respondent present.

#### **REASONS FOR GRANTING THE WRIT**

The Government does not deny that the respondent was entitled to be notified and to be present at the hearing in the District Court on the motion which he filed under Section 2255.<sup>1</sup> If the Court of Appeals had merely reversed the action of the District Court and remanded the proceeding for a new hearing with respondent present, no further review would be sought. Indeed, in our opinion, that would have been the correct disposition of the case. The Court of Appeals, how-

<sup>1</sup> This was admitted in the Government's petition for rehearing below.

ever, ordered the motion dismissed, both on the ground that Section 2255 is unconstitutional, and that it does not provide an adequate remedy where the presence of a prisoner from without the district is required. This decision precludes a new hearing with the respondent present, and nullifies the procedure embodied in Section 2255 whereby a prisoner is to obtain the equivalent of habeas corpus relief in the court in which he had originally been tried rather than in the court of the district in which he is confined. See Chief Judge Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171. The decision below holding Section 2255 unconstitutional and, in the alternative, unavailable in most of the situations it was meant to reach, thus raises questions of obvious importance. The decision is in conflict with decisions of other circuits, and it is also, in our view, incorrect as a matter of law. The case is thus clearly a proper one for this Court to review.

1. The decision below holding Section 2255 unconstitutional or inapplicable in most cases presents questions of substantial importance in the administration of Federal criminal justice. The evils arising from abusive use of the writ of habeas corpus came to the attention of the Judicial Conference of the United States, which in 1942 appointed a committee under the chairmanship of Chief Judge Parker of the Court of Appeals for the Fourth Circuit to study the mat-

ter and make recommendations. Most of the recommendations made by the Judicial Conference were embodied in bills introduced into Congress, which were subsequently carried into the 1948 revision of the Judicial Code. See *Reps. of the Judicial Conference of the United States*, September 1943, p. 22; October 1946, p. 21; September 1947, pp. 17-18; 28 U. S. C. 2241, *et seq.* and legislative history of the Revision, 1949 U. S. Code, Cong. Service, pp. 1248-1282. The proposed changes, of which Section 2255 was one, as Chief Judge Parker remarked, "have had the most careful scrutiny of the Judiciary as well as of the Committee on Revision and of the Congress." Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 173. The decision below nullifies this important statutory provision.

2. The decision below is in admitted conflict with *Barrett, et al. v. Hunter*, 180 F. 2d 510 (C. A. 10), certiorari denied, 340 U. S. 897, and also is in conflict with *Martin v. Hiatt*, 174 F. 2d 350 (C. A. 5), both of which sustained the constitutionality of Section 2255. See also *Weber v. Steele*, 185 F. 2d 799 (C. A. 8); *Armstrong v. Steele*, 181 F. 2d 763 (C. A. 8); *Pinkerton v. Steel*, 181 F. 2d 536 (C. A. 8); *Curran v. Shuttleworth*, 180 F. 2d 780 (C. A. 6); *Howard v. United States*, 186 F. 2d 778 (C. A. 6); *Meyers v. Welch*, 179 F. 2d 707, 708 (C. A. 4);

*Meyers v. United States*, 181 F. 2d 802, 804 (C. A. D. C.), certiorari denied, 339 U. S. 983, in all of which the constitutionality of Section 2255 was assumed. In the *Barrett* case the Court of Appeals for the Tenth Circuit held (180 F. 2d at 516) that "So long as there is open to the prisoner a remedy in one court, with full right of review by appeal and petition for certiorari, it is not a suspension of the writ to withhold jurisdiction from other Federal courts, except in cases where the remedy in the sentencing court is inadequate or ineffective." The court stated that the district court could require the presence of a prisoner confined outside the district (p. 514).

In *Martin v. Hiatt*, 174 F. 2d 350 (C. A. 5), the Court of Appeals for the Fifth Circuit held the statute valid; it stated that "Congress has not undertaken to suspend the writ but has set up procedure that is designed to supply a more appropriate remedy to those unlawfully detained as well as to preserve the writ for those who are entitled to it and at the same time to protect it from abuse by those who do not deserve it, but who clamor for it incessantly" (174 F. 2d at 352).

In view of this admitted conflict in the decisions on the constitutionality of Section 2255, the court below itself suggested the necessity for authoritative determination of the question by this Court (R. 35, 49).

3. Whether the requirement of Section 2255 that a federal prisoner seek a correction of judg-

ment in the sentencing court before being allowed to petition for a writ of habeas corpus be deemed a condition precedent to filing of a petition for the writ or a substitute therefor, Congress had the power to prescribe such procedure. See *Ex parte Royall*, 117 U. S. 241; *Ex parte Yarbrough*, 110 U. S. 651. The procedure outlined in Section 2255 does not deny the movant a fair judicial hearing. Basically, only the forum in which the proceedings are brought is changed. There does not seem to be any valid reason why the sentencing court, where the record of trial is preserved and the judge and counsel who participated therein are found, is not a more convenient and appropriate forum for challenging the constitutionality of its judgment than the court which has no previous familiarity with the case but merely happens to have jurisdiction in the district in which the prisoner is detained.

The majority below were of the opinion that the "prompt hearing" provided for in the third paragraph of the section contemplates an "ex parte hearing" exclusively, at which the prosecution is present but not the prisoner, and that the fourth paragraph of that section gives the judge an absolute and unqualified discretion to determine the motion on the merits without requiring the production of the prisoner at the hearing. We submit that such an interpretation of the statute, which gives rise to the doubts as to its validity, is unwarranted and should be avoided.

The correct construction was stated by the Tenth Circuit in the *Barrett* case, 180 F. 2d at 514, as follows: "we think the intention was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the prisoner is unnecessary to afford him the relief to which he is entitled, or where only issues of law are presented. But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the Court should require the production of the prisoner." Even in a habeas corpus proceeding, the court does not automatically order the prisoner's production upon the filing of a petition for the writ. It is only when the writ is granted that the prisoner is produced, and the court may decline to issue the writ if on its face the application therefor is baseless as a matter of law. *Walker v. Johnston*, 312 U. S. 275, 284.

We submit, contrary to the views expressed below, that the trial court has power to order the production of the prisoner at a hearing under Section 2255 even when he is confined without the district, and that the section accordingly provides an adequate remedy in such circumstance. Judge Pope, dissenting below, expressed the reasonable view that "inherent" in Section 2255

"is the power to require and secure the presence of the prisoner, where necessary" (R. 50). This follows, as he noted, from the duty of the district court to "grant a prompt hearing," to "determine the issues and make findings of fact," and to "correct the sentence." These provisions necessarily imply a constitutional hearing, with the prisoner present. If there should be any doubt as to this, the section should be construed in a manner which will render it both constitutional and effective to accomplish its useful purpose. Apart from the section itself, the district court has authority to require the prisoner's presence by virtue of 28 U. S. C. 1651, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law." See *Price v. Johnston*, 334 U. S. 266, 278-282.

This Court has in many cases held that prisoners must exhaust other remedies before seeking the extraordinary remedy provided by the writ of habeas corpus; this has not been deemed to involve an unconstitutional suspension of the writ. *Gusik v. Schilder*, 340 U. S. 128; *Darr v. Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114, 116-117; *United States v. Sing Tuck*, 194 U. S. 161, 167-168. There is even less reason why Section 2255, which affords a remedy equal in effectiveness to habeas corpus, should be re-

garded as a suspension of the writ. *Martin v. Hiatt*, 174 F. 2d 350, 352-353 (C. A. 5).

The remedy afforded by Section 2255 resembles the common law writ of error *coram nobis*; it is designed to provide a simple procedure for correcting an erroneous judgment of conviction. It may be used to modify or revise a judgment of conviction, which habeas corpus traditionally would not do. *Harlan v. McGourin*, 218 U. S. 442; *United States v. Pridgeon*, 153 U. S. 48, 63. The object and purpose of this section is "to afford a prisoner the right to make a direct attack on the legality of his detention on any of the grounds for collateral attack" that might be set up in an application for a conventional writ of habeas corpus. *Barrett v. Hunter, supra*, 180 F. 2d at 513.

The preclusion of an application for a writ of habeas corpus, if the motion under the section is decided adversely to the prisoner, does not impose an absolute rule of *res judicata*; for it saves the right to the writ if "the remedy by motion is inadequate or ineffective to test the legality of his detention." Cf. *Salinger v. Loisel*, 265 U. S. 224, 230, 232. In any event, Congress has the power to make a judgment in habeas corpus *res judicata* without violating the provision against suspension of the writ. *Martin v. Hiatt*, 174 F. 2d 350, 352-353 (C. A. 5).

Thus, Section 2255 is not an abrogation of the right collaterally to attack a conviction obtained

in violation of constitutional rights. It "preserves the essentials of the remedy afforded by the great writ of freedom, effecting change in procedure only and lessening opportunities for abuse of the writ." *Barrett v. Hunter*, 180 F. 2d at 516.

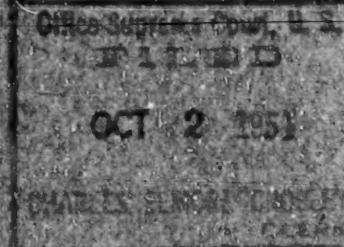
#### CONCLUSION

In view of the conflict of decisions and the obvious importance of settling the question of the constitutionality of Section 2255, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH 1951.

Library



**No. 23**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1951**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**HERMAN HAYMAN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES**

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinions in the Court of Appeals on respondent's appeal (R. 22-43) and on the Government's petition for rehearing (R. 46-51) are reported at 187 F. 2d 456.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1950 (R. 44), and the Government's petition for rehearing was denied on February 26, 1951 (R. 45). The petition for a writ of certiorari was filed on March 28, 1951,

and certiorari was granted on May 14, 1951 (R. 52). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

#### QUESTIONS PRESENTED

28 U. S. C. 2255 requires a prisoner who wishes to test the legality of his detention under sentence of a federal court to seek relief by motion in the court which imposed the sentence, and permits an application for habeas corpus to be entertained only if the remedy by motion is "inadequate or ineffective." A motion, filed under that section by a prisoner confined outside the district in which he was sentenced, concededly raises issues of fact entitling the prisoner to a hearing at which he is present. Two questions are presented:

1. Whether, in such a case, the remedy under § 2255 is necessarily "inadequate or ineffective."
2. Whether, as applied to such a case, § 2255 violates the prohibition of Art. I, Sec. 9, cl. 2 of the Constitution against the suspension of the privilege of the writ of habeas corpus except when, in cases of rebellion or invasion, the public safety may require it.

#### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 9, clause 2, of the Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

28 U. S. C. 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

#### STATEMENT.

Respondent was convicted in the District Court for the Southern District of California on six counts charging impersonation and forging and uttering forged endorsements on government checks (R. 2), chiefly purloined from the mail boxes of veterans and soldiers' families (R. 43). He was sentenced on January 20, 1947, to twenty years' imprisonment (R. 9-10). The judgment was affirmed by the Court of Appeals for the Ninth Circuit (163 F. 2d 1018).

On May 11, 1949, respondent, who was then confined in McNeil Island, Washington penitentiary,<sup>1</sup> filed a motion in the sentencing court, pursuant to 28 U. S. C. 2255, attacking the validity of his conviction (R. 1-4). He also moved for a writ of habeas corpus or other order to bring him from his place of confinement for a hearing on the motion (R. 4). In his motion, as amended June 8, 1949 (R. 5-7), he alleged three grounds in support of the relief claimed, one of which (the only one involved here)<sup>2</sup> was that he was deprived of the effective assistance of counsel because of a conflict of interest in that his attorney, without his knowledge and consent, also represented an accomplice who testified against him (R. 3). He requested that he be granted a new trial (R. 4).

<sup>1</sup> He is now in Alcatraz penitentiary.

<sup>2</sup> Respondent's other claims were: (1) "that he was arrested without a warrant, and questioned for five days before he \* \* \* was taken before a committing magistrate" (R. 2). He did not, however, assert that any confession or admission was obtained during this period or offered or received in evidence (R. 40). (2) That the first and second counts of the indictment charged the same offense (R. 5-6). But the motion (R. 2) described the first count as based on 18 U. S. C. (1946 ed.) § 78 (now § 914), which prohibits falsely personating a lawful holder of a debt of and due from the United States, and the second count as based on 18 U. S. C. (1946 ed.) § 63 (really § 73, now § 495), which prohibits falsely making, forging and counterfeiting an endorsement on a check—two totally different offenses. These averments on their face are insufficient in law to state a basis for the granting of the motion, as the court below held (R. 22, 40).

The District Court conducted an *ex parte* hearing (R. 8, 24), receiving the evidence of government witnesses, including the United States Attorney and respondent's trial counsel (R. 24). Respondent was not notified of the hearing and was neither present at the hearing nor represented by counsel (R. 8, 24). On the basis of the evidence at the hearing, the court made findings of fact and conclusions of law (R. 8-12), and denied the motion (R. 12).

The Court of Appeals reversed the order denying the motion and ordered the motion dismissed (R. 44). Three separate opinions were filed (R. 22-43). Chief Judge Denman, after expressing doubts as to the constitutionality of Section 2255, found that the motion was "inadequate and ineffective" within the meaning of Section 2255, since it afforded respondent no opportunity to prove facts outside the record. His reasoning was that respondent was entitled to be present at the hearing, yet there was no provision in Section 2255 for notifying him, and the District Court had no power to command that he be brought before it. Judge Stephens thought the section was an unconstitutional suspension of the writ of habeas corpus, because it postponed an application for habeas corpus and because the judgment on the motion would be practically conclusive. Judge Pope dissented on the ground that the constitutionality of the section was not involved since respondent had not been denied

relief by habeas corpus. He also concluded that the motion, files, and record showed conclusively that respondent was entitled to no relief, and that the judge could therefore properly have denied the motion without any hearing.

The Government petitioned for a rehearing and a consideration of the case *en banc*. The petition was denied, with the same panel sitting (R. 46-51). But this time Judge Denman adopted the reasoning of Judge Stephens, and stated that Judge Stephens agreed with Judge Denman's first opinion as an alternative ground of decision. In other words, the court held that Section 2255 is an unconstitutional suspension of the privilege of the writ of habeas corpus, and, alternatively, that the motion procedure is inadequate and ineffective as to respondent. Judge Pope again dissented.

The Government, in its petition for rehearing in the court below, conceded that a factual issue was raised which required respondent's presence at a hearing, and urged that the judgment be reversed on that ground and the cause remanded for hearing (R. 46). In its petition for a writ of certiorari, the Government similarly conceded that respondent was entitled to be notified and to be present at a hearing (Pet. p. 10). The merits of the motion are, therefore, not involved here.

**SUMMARY OF ARGUMENT**

The Government concedes that respondent is entitled to be present at a hearing on the question of the asserted denial of the effective assistance of counsel at his criminal trial. Hence, the sole issue here is whether he should obtain that hearing by motion in the sentencing court where he asked for it and where the Government agrees that he should get it, or whether he must proceed by petition for habeas corpus in the district within which he is confined, as the court below held. Contrary to the holding below, we believe that Section 2255 affords an adequate remedy for the asserted denial, that it does not offend the constitutional prohibition against suspension of the writ of habeas corpus, and that, accordingly, the procedures which it prescribes should be followed.

**I**

A. Section 2255 of the Judicial Code was derived from legislation proposed by the Judicial Conference of the United States. The congressional materials shed scant light on its purposes and construction. Memoranda and reports submitted to the Judicial Conference, or submitted on behalf of the Conference to Congress, clearly show, however, that the principal objective of the draftsmen of the provision which became Section 2255 was to eliminate collateral attacks by habeas corpus on judgments of criminal con-

viction in federal courts by substituting for habeas corpus a remedy of equivalent scope in the sentencing court. This substitution was deemed particularly desirable in cases raising issues of fact outside the record, and it was expressly contemplated that the prisoner could be produced for a hearing in the sentencing court when that course seemed appropriate. It is apparent that the purpose of the draftsmen of this provision to avoid "the unseemly procedure of one district court being required to try the procedure of another district court," would be defeated by the holding of the court below that it is inapplicable in cases in which a prisoner confined outside the district in which he was sentenced raises factual issues.

B. 1. The principal basis for the court's decision that the remedy under § 2255 was inadequate lay in its view that the sentencing court was without power to bring the prisoner to the court for a hearing. But power to produce the prisoner, and to make any appropriate provisions to enable him to prepare and present his case, is implicit in the statutory scheme. It is also explicit in the provision of 28 U. S. C. 1651 authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." The traditional writs of habeas corpus *ad testificandum* and *ad prosecundum* would seem clearly adequate to serve this function. Cf. *Price v. Johnston*, 334 U. S. 266. The power to issue such writs to require the produc-

tion of persons confined outside the district in which the court sits has been repeatedly recognized by the courts. *Ahrens v. Clark*, 335 U. S. 188, on which the court below relied, was concerned solely with the power of a court to initiate a proceeding to inquire into the cause of a prisoner's detention; nothing in the decision purports to limit the power of a court which has jurisdiction of a proceeding to issue ancillary process. The language of 28 U. S. C. 2241 authorizing federal courts and judges to issue writs of habeas corpus "within their respective jurisdictions" is broad enough to include authority to issue the writ in aid of an existing jurisdiction, and the legislative history of the provision shows without doubt that the present phraseology was not intended to change the previously existing law. In fact, in proceedings under § 2255, prisoners have frequently been produced from outside the district. No court has experienced any difficulty in bringing the prisoner before it. The existence of power to produce the prisoner in such cases has never been challenged by the Department of Justice, which has custody of federal prisoners.

2. The view of the court below that § 2255 contemplates a totally inadequate hearing is also plainly without support. Under that section, a motion may be dismissed *ex parte* if the motion, together with the files and record in the case, conclusively show that the prisoner is entitled to no relief. Similarly, in habeas corpus, summary

dismissal on the face of the petition, or on the basis of "incontrovertible facts, such as those recited in a court record," is clearly proper. *Walker v. Johnston*, 312 U. S. 275, 284. Unless the motion can be thus summarily dismissed, the statute clearly contemplates that it shall be disposed of by an adversary proceeding. Accordingly, we agree that the district court erred in taking evidence *ex parte*. The fact that § 2255 does not in all cases require the presence of the prisoner at a hearing does not render inadequate the remedy which it affords. There may well be situations in which production of the prisoner is unnecessary and his rights can be adequately protected by appointment of counsel or other means. We do not, however, dispute that where substantial issues of fact are raised on which the testimony and credibility of the prisoner are important he should, absent special circumstances, be produced. Accordingly, we have conceded that he should be produced at a hearing in this case. Under these circumstances, we do not think it necessary—even if it were possible—to attempt to define or catalogue the situations in which it might be appropriate to proceed without producing the prisoner.

C. Even if the motion remedy were less clearly adequate than it is, we believe that orderly procedure requires that it be pursued to completion before resort to habeas corpus can be permitted. Accordingly, once the errors into which the dis-

trict court fell had been corrected by the Government's concession that respondent was entitled to be present at a hearing, the court below should have remanded the cause to the district court for hearing.

## II

A. The discussions attending the adoption of Article I, § 9 of the Constitution, and the historical evils to which it was addressed, show that the purpose of the framers was to insure the availability of some remedy to persons unlawfully detained, and to limit the power to suspend that remedy to cases of rebellion or invasion in which the public safety required a suspension. Nothing in the constitutional provision or its attendant history suggests that the framers of the Constitution intended to deny to Congress the power to regulate procedure in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of federal courts to issue it. Congress has repeatedly exercised that power and this Court has without exception sustained its action.

B. At the time the Constitution was adopted, habeas corpus was not conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The extension of the writ to permit collateral attacks on judgments of conviction, and the liberalization of habeas corpus procedure to provide for a determination of issues of fact outside the record of conviction, has been

a relatively recent development which rested on the language of the 1867 act. Accordingly, we think there can be no doubt that, in this area at least, Congress had power to substitute for habeas corpus a remedy of equivalent scope in the sentencing court. It was open to Congress, as to the states, to "choose the procedure it deems appropriate for the vindication of federal rights." *Young v. Ragen*, 337 U. S. 235, 238. And since, as is indicated by *Ahrens v. Clark*, 335 U. S. 188, Congress can validly restrict a prisoner's remedy to a single district court, we see no reason why it could not choose the district in which he was sentenced rather than the district in which he is confined.

C. Although we think Congress could have completely substituted the motion remedy for habeas corpus, it was careful to preserve the right to apply for habeas corpus in any case in which the motion procedure might prove "inadequate or ineffective." Thus, it has at most postponed the right to resort to habeas corpus. Even in the absence of statutory requirement, habeas corpus, as an extraordinary remedy, is generally not allowed where some other remedy is available and has not been exhausted. This rule has been applied to require exhaustion of remedies by appeal, before administrative agencies, before military tribunals, and in state courts. Its application here by legislative command cannot be deemed a suspension of the writ.

D. The provision of § 2255 that a court "shall not be required" to entertain a second motion violates no constitutional provision; it simply makes applicable the rule of *Salinger v. Loisel*, 265 U. S. 224, that whether to entertain a second petition for habeas corpus rests in the court's discretion.

#### **ARGUMENT**

##### **INTRODUCTION**

The Government does not dispute that the allegations of petitioner's motion were sufficient to entitle him to obtain and be present at a hearing on the question of fact as to whether he was denied the effective assistance of counsel at his trial.<sup>3</sup> Accordingly, the sole question here is the procedural one whether he can obtain that hearing by motion in the sentencing court where he asked for it, and where the Government agrees that he should get it, or whether he must proceed by petition for habeas corpus in the district within which he is confined. The majority below held that his only remedy was habeas corpus, and ordered his present proceeding dismissed. Both Judge Denman and Judge Stephens held or assumed that a proceeding by motion in the sentencing court, brought by one confined outside the district in which he was sentenced, is *necessarily* inadequate to afford relief in any case in-

<sup>3</sup> The Government so conceded in its petition for rehearing in the Court of Appeals (see R. 46) and in its petition for certiorari (Pet. 10).

volving issues of fact outside the original trial record. From this premise they drew two alternative conclusions, (a) that whenever issues of fact are thus presented, Section 2255 of the Judicial Code is by its terms inapplicable, and (b) that, at least as to such cases, the provision of Section 2255 restricting the power of courts to entertain petitions for habeas corpus is unconstitutional. This holding is contrary to the decisions of every other court which has been faced with a similar problem; most courts of appeals and many district courts have held, assumed or stated that § 2255 provided both a constitutional and an adequate remedy for persons confined outside the district of trial.\*

\* The 5th and 10th Circuits have expressly held Sec. 2255 constitutional. *Martin v. Hiatt*, 174 F. 2d 350 (C. A. 5); *Barrett v. Hunter*, 180 F. 2d 510 (C. A. 10), certiorari denied, 340 U. S. 897. See also *Wong v. Vogel*, 80 F. Supp. 723 (E. D. Ky.); *St. Clair v. Hiatt*, 83 F. Supp. 585 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967. The 5th, 6th, 8th and 10th Circuits have held that resort to Sec. 2255 is a prerequisite to seeking habeas corpus: *Cline v. Hiatt*, 174 F. 2d 822 (C. A. 5); *Tacoma v. Hiatt*, 184 F. 2d 569 (C. A. 5), certiorari denied, 340 U. S. 955; *Curran v. Shuttleworth*, 180 F. 2d 780 (C. A. 6); *Donnelly v. Steele*, 180 F. 2d 1019 (C. A. 8); *Armstrong v. Steele*, 181 F. 2d 763 (C. A. 8); *Pinkerton v. Steele*, 181 F. 2d 536 (C. A. 8); *Weber v. Steele*, 185 F. 2d 799 (C. A. 8); *Hallowell v. Hunter*, 186 F. 2d 873 (C. A. 10); *Brown v. Hunter*, 187 F. 2d 543 (C. A. 10); *Barnes v. Hunter*, 188 F. 2d 86 (C. A. 10). See also *Clark v. Memolo*, 174 F. 2d 978, 982 (C. A. D. C.); *Davis v. Humphrey*, 80 F. Supp. 513 (M. D. Pa.); *Gebhart v. Hunter*, 89 F. Supp. 336 (D. Kans.), affirmed, 184 F. 2d 644 (C. A. 10); *Hart v. Hunter*, 89 F. Supp. 153 (D. Kans.); *Lowe v. Humphrey*,

In our view, the premise on which both aspects of the court's decision rests is plainly erroneous. We believe that the procedure by motion in the sentencing court, prescribed by Section 2255, was clearly intended to be the exclusive procedure in cases presenting factual issues as in other cases, subject only to rare exceptions, and that it affords opportunity for a full hearing in the sentencing court whenever the motion raises issues calling for such a hearing. If we are correct in this view of the purpose and effect of Section 2255, we think it follows that the asserted constitutional issues are without substance. Accordingly, we shall discuss, first, the construction and effect of Section 2255, and, second, the constitutional issues.

## I

THE COURT BELOW ERRED IN HOLDING THAT THE PRESENT PROCEEDING BY MOTION IN THE SENTENCING COURT WILL BE INADEQUATE TO TEST RESPONDENT'S ASSERTIONS THAT HE WAS CONVICTED IN VIOLATION OF CONSTITUTIONAL RIGHTS

**A. THE PURPOSE OF SECTION 2255 WAS TO ELIMINATE COLLATERAL ATTACKS BY HABEAS CORPUS ON CRIMI-**

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80 F. Supp. 442 (M. D. Pa.), certiorari denied, 337 U. S. 944, 339 U. S. 988; *Robinson v. Swope*, 96 F. Supp. 98 (N. D. Cal.). All of the circuits have given effect to Sec. 2255. In addition to cases in circuits mentioned above, see *Carvell v. United States*, 173 F. 2d 348 (C. A. 4); *Mercado v. United States*, 183 F. 2d 486 (C. A. 1); *United States v. Tacoma*, 176 F. 2d 242 (C. A. 2); *United States v. Gallagher*, 183 F. 2d 342 (C. A. 3), certiorari denied, 340 U. S. 913; *United States v. Sturm*, 180 F. 2d 413 (C. A. 7), certiorari denied, 339 U. S. 986; *Hastings v. United States*, 184 F. 2d 939 (C. A. 9); *Adelman v. United States*, 174 F. 2d 283 (C. A. 9).

NAL JUDGMENTS, BY SUBSTITUTING AN EQUIVALENT  
REMEDY BY MOTION IN SENTENCING COURT

Section 2255 was enacted on June 25, 1948, as part of the revision of the Judicial Code. The congressional materials shed scant light on its purposes and construction. H. Rept. 308, 80th Cong., 1st Sess., p. 7, states merely that "The habeas corpus chapter has been written to conform with legislation pending in Congress and approved by the Judicial Conference of the United States (see H. R. 4232, 4233, and S. 1451, 1452, 79th Cong.)." See also S. Rept. 1559, 80th Cong., 2d Sess., pp. 8-10.

The section, together with a number of the related provisions of Sections 2241-2254, was, however, the outgrowth of recommendations of the Judicial Conference,<sup>5</sup> which were embodied in bills drafted and approved by the Conference and introduced at the Seventy-ninth Congress. (H. R. 4232, 4233; S. 1451, 1452. See also H. R. 6723.) Both the House Report and the Reviser's Notes expressly referred to those bills as the source for the present provisions of Section 2255 and related sections of the Judicial Code.<sup>6</sup> Under these cir-

<sup>5</sup> The Judicial Conference, created by the Act of September 14, 1922, 42 Stat. 838, 28 U. S. C. 331, consists of the Chief Justice of the United States and the Chief Judge of each judicial circuit.

<sup>6</sup> See Reviser's Notes to Sections 2244-2250, 2255. The note to Section 2255 states "[This section] has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress," 28 U. S. C. following Section 2255.

cumstances, the records of the Judicial Conference, which contain the only extended authoritative discussions of the purpose and effect of the proposed bills, are a valuable guide to the construction of the present Judicial Code provisions.<sup>7</sup>

The Court has given weight to the explanation of a bill by those responsible for its preparation and submission to Congress. *United States v. American Trucking Associations*, 310 U. S. 534, 547-551; cf. *Shapiro v. United States*, 335 U. S. 1, 11-12. The statements of the Judicial Conference, whose recommendations Congress accepted without debate or dissent, would seem to be of considerably greater significance in dealing with legislation of this sort.

The Judicial Conference proposals were the fruits of extended consideration by the Conference. At the September 1942 meeting of the Conference a committee "to study the entire subject of procedure on applications for habeas corpus" was appointed, consisting of Circuit Judges Parker, Stone and Albert Lee Stephens, and District Judges Underwood, Vaught, and Wyzanski. Annual Report, Judicial Conference, 1942,

<sup>7</sup>The conference records consist of the printed reports of sessions of the Conference and of memoranda prepared by a committee of the Conference or by the Administrative Office of the United States Courts and submitted to the Conference, to all district and circuit judges or to members of Congress in explanation of the proposed bills. These memoranda are available in the files of the Administrative Office; for the convenience of the Court we have printed them as an appendix to this brief, *infra*, pp. 87-187.

p. 18. That committee submitted, at the September 1943 session of the Conference, a report and supplemental report and a draft of two proposed bills (Appendix, pp. 87-104, *infra*). These bills, as amended and approved by the Conference, consisted of (1) a "jurisdictional bill", Section 1 of which related to habeas corpus applications by state prisoners, and Section 2 of which was the predecessor of the present Section 2255, and (2) a "procedural bill" which was the predecessor of the present Sections 2244-2250. Annual Report, 1943, pp. 22-4. At subsequent meetings the Conference renewed its approval of these bills (Annual Reports, 1944, p. 22; 1945, p. 28).

*congress* The conference bills were transmitted to the ~~Chairmen of the House and Senate Judiciary Committees~~ and were introduced as H. R. 4232, 4233, S. 1451, 1452, in October 1945. A substitute for the "jurisdictional bill", which had also received ~~informal~~ Conference approval, was introduced at the same Congress as H. R. 6723. (See Appendix, pp. 122-123, *infra*). At a special session in April 1947, the Conference committee submitted a further report (Appendix, p. 144, *infra*) renew-

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\* H. R. 6723 differed from H. R. 4233 in (a) omitting a provision (not included in the Judicial Code) for a three-judge court to try habeas corpus applications by state prisoners and (b) including a provision (not included in the Judicial Code) limiting the time within which a motion to vacate could be filed by a federal prisoner.

ing its approval of H. R. 4232 and 4233, expressing disapproval of H. R. 6723, and proposing certain additional amendments to both bills. Pursuant to directions of the Conference (Report of Special Session, April 1947, p. 46), copies of the three bills, with an accompanying memorandum by Judge Parker (Appendix, pp. 159-182, *infra*), were distributed to all district and circuit judges for comment.

Meanwhile, a problem had arisen by reason of the fact that the House Committee on Revision of Laws was engaged in revising the Judicial Code, including the provisions relating to habeas corpus. The chairman of that committee was informed in 1946 of the Conference proposals and of the desirability of avoiding conflict between those proposals and the pending revision. (See Appendix, p. 124, *infra*; see also Annual Report 1945, p. 26.) At the September 1947 session of the Conference, the habeas corpus committee filed a further report (Appendix, p. 182, *infra*) which pointed out that the Judicial Code as passed by the House, "incorporates most of the provisions contained in the proposals considered by the Conference and the judiciary" and recommended that the Conference abandon further consideration of the bills which it had proposed, and press instead for adoption of Chapter 153 of the proposed Judicial Code (embodiment the present Sections 2241-2255). This

recommendation was adopted. (Annual Report, 1947, p. 17.)<sup>9</sup>

The various reports and memoranda submitted in connection with the consideration of these proposals by the Conference show beyond question that the committee which drafted the provision which became Section 2255, and the Conference which approved it, understood that its effect was to authorize a remedy in the sentencing court substantially equivalent to habeas corpus,<sup>10</sup> to make that remedy the ordinary means of relief for federal prisoners, and to preclude relief by habeas corpus except in rare cases. They indicate, moreover, that it was precisely in cases presenting issues of fact outside the record that this substitution of the motion procedure was deemed particularly desirable. And, while the procedures to be followed under the motion remedy are not discussed in detail, all of the reports and discussions are clearly premised on the view that that remedy would afford an opportunity for hearing and de-

<sup>9</sup> The Conference proposed certain amendments to Sections 2244 and 2254, which were adopted by the Congress. See S. Rept. No. 1559, 80th Cong., 2d Sess., pp. 8-10.

<sup>10</sup> As the Reviser's Notes point out, this remedy was in the nature of the old writ of *error coram nobis*. Whether that remedy was available in federal courts, and the extent to which equivalent relief could be had by motion, was a matter of very considerable doubt prior to the adoption of Section 2255. Compare, e. g., *Robinson v. Johnston*, 118 F. 2d 998, 1000 (C. A. 9), reversed, 316 U. S. 649, with *Murrey v. United States*, 138 F. 2d 94, 96 (C. A. 8).

termination of factual issues which would be an adequate and effective substitute for the procedural rights available on habeas corpus.

The first report of the habeas corpus committee, submitted to the Conference in 1943 (Appendix, p. 87, *infra*) emphasizes the special concern of that committee with cases presenting issues of fact outside the record. It states (p. 88, *infra*):

The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial.

After referring to recent decisions expanding the scope of habeas corpus and permitting consideration of facts outside the record, the report continues (pp. 90-91, *infra*):

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under

the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker v. Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell v. Youell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of

the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error *coram nobis*, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

As the report subsequently indicates, the Committee was unanimous in recommending adoption of a provision authorizing application for relief by motion in the sentencing court. Judges Stephens, Underwood and Wyzanski were recorded as objecting to any provision that the availability of such a procedure should restrict a prisoner's right to apply for habeas corpus. The Conference, however, approved the inclusion of such a provision. Annual Report, 1943, pp. 22-24. (For the text of the provision approved see *infra*, p. 26). In subsequent reports of the Committee, Judges Stephens, Underwood and Wyzanski did not renew their objections to this aspect of the bill. See Appendix, pp. 144-186, *infra*.<sup>11</sup>

<sup>11</sup> In the 1947 report, the same three judges did object to a provision in the "procedural bill" that no judge or court "shall entertain" a habeas corpus petition which presents no grounds for relief "not theretofore presented and determined" (see Appendix, pp. 154-159, *infra*). Subsequently, the Committee unanimously approved a provision that no judge or court "shall be required to" entertain a habeas corpus petition presenting no new ground if the judge or court is

Substantially, the same view of the purpose and effect of the proposed provision was reiterated in subsequent reports of the Committee.<sup>12</sup> Thus, the report of the habeas corpus committee in 1947 states (Appendix, pp. 147-148, *infra*) :

Your Committee deems it unnecessary to repeat what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

A memorandum submitted in 1945 by Circuit Judge Stone, acting for the Committee, to the chairmen of the House and Senate Judiciary committees in explanation of the bills proposed by the Conference (which had then been introduced) reflects a similar view and described the pro-

"satisfied that the ends of justice will not be served" by further requiring the detention (Appendix pp. 183-185, *infra*). In that form, the provision became 28 U. S. C. 2241.

<sup>12</sup> A memorandum by Judge Parker accompanying the transmittal of the bills to all district and circuit judges in 1947 repeats almost verbatim the statements quoted from the 1943 report, omitting, however, any reference to any disagreement within the committee (see p. 24, *supra*).

posed motion remedy as "intended to be as broad as habeas corpus." (Appendix, p. 137, *infra*.)

The bill approved by the Judicial Conference contained a provision, comparable to, but worded somewhat differently from, the last paragraph of Section 2255, which would have precluded the courts from entertaining a habeas corpus petition by one eligible to apply for relief by motion

unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons.<sup>13</sup>

Standing by itself the phraseology of this provision might perhaps be taken to suggest an understanding that use of the motion remedy would frequently or typically be impracticable in cases presenting factual issues because of the inability of a prisoner confined outside the district to be present at such cases. It might also suggest some degree of judicial discretion to assess the relative convenience of the two procedures and choose the more convenient. The statements submitted to

<sup>13</sup> The quoted language is taken from the bill as presented to and introduced in Congress (see Appendix, *infra*, pp. 117, 176). It differs from the wording set out in the 1943 Conference report, the final phrase of which had read "because of the necessity of his presence at the hearing \* \* \*" (Annual Report, 1943, p. 24). The change in phraseology from "necessity" to "inability" was presumably made by a committee on style appointed by the Conference (Annual Report, 1943, p. 22).

Congress on behalf of the Conference clearly show, however, that even under the relatively flexible phraseology approved by the Conference it was contemplated that the motion procedure would be the normal remedy and habeas corpus the exceptional one, in factual cases as in other cases.

The memorandum submitted by Circuit Judge Stone to the chairman of the congressional committees in explanation of the bills is explicit as to this. It states (Appendix, pp. 139-140, *infra*) :

Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal (one or all of them) are required to attend the habeas corpus hearing as witnesses. Such attendance is sometimes necessary to refute particular testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witness present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. Some realization of the possible extent of this burden on Court officials may be gained from the bare statement that, while convictions occur in all of

the Districts throughout the country, federal prisoners are confined in a very small number of penal institutions; and habeas corpus must now be brought in the District where the petitioner is confined. Even if the testimony of these officials is taken by deposition, the interference and interruption is merely lessened in degree and the above danger is risked.

The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file baseless motions in order to have a "joy ride" away from the prison at Government expense.

Balancing these, as well as less important, considerations, the Conference is of opinion that the advantages outweigh and that the motion remedy is preferable. As to the risk (escape or delivery) while transporting the prisoner to the District of conviction, the difference is only one of degree—of distance and, therefore, of opportunity. As to the expense, it is highly probable that it would be more expensive for the Government witnesses to go from the District where sentence was imposed and return than for the prisoner to be brought to such District and returned. As to the incentive to file petitions, the difference is between a longer and a shorter trip to the Court. It is thought that the provision in Section 2 providing for habeas corpus (in the District of confinement)

where it is not "practicable to determine his rights \* \* \* on such a motion" will furnish a sufficient discretion in the judge or court before whom habeas corpus is filed to evaluate and defeat the above "disadvantages" to a large degree.<sup>14</sup>

This discussion of the relative advantages and disadvantages of transporting the prisoner to the District of conviction would have been meaningless if it had been thought that the reference to the prisoner's "inability to be present at the hearing" meant that no prisoner confined outside the District of trial could ever be brought to a hearing, or that the "where not practicable" proviso would apply to every case involving factual questions when the prisoner was so confined. The use of "practicable" suggests that the Conference was thinking of practical, not legal, impediments to the prisoner's presence. The kind of case which the proviso was intended to reach is illustrated in a memorandum submitted by Director Chandler of the Administrative Office to accompany the transmittal of the bills to Congress in 1944, which stated: "Such an instance might occur where a

<sup>14</sup> Judge Stone's suggestion of judicial discretion in the habeas corpus court to apply principles analogous to the doctrine of *forum non conveniens*, while a permissible reading of the Conference bill, would clearly appear inapplicable to the provisions of Section 2255. Section 2255 requires application to be made to the trial court, except where that remedy would be "inadequate or ineffective," not merely inconvenient.

dangerous prisoner, who had been convicted in the Southern District of New York, was confined in Alcatraz Penitentiary." (Appendix, p. 113, *infra*.)

The statutory provision was given its present form by the House Revisers, whose draft was approved by the Judicial Conference (Annual Report, 1947, pp. 17-18). No explanation was given for the change in language by which the clause "unless it also appears that the remedy by motion is inadequate or ineffective" replaced the "where not practicable" proviso. The more general language substituted would certainly negative any possible intimation that the new motion procedure would be generally unavailable to prisoners confined outside the District. Doubtless the case of the prisoner too dangerous to transport could be handled in the same way; if the judge to whom the motion was presented concluded that the public interest made it undesirable or unsafe to bring him far from the prison and that the prisoner's presence was indispensable to a fair hearing,<sup>15</sup> the effect would be to remit the prisoner to the institution of a habeas corpus proceeding where he was confined.

The reports and memoranda of the Judicial Conference do not discuss in detail the procedural aspects of the proposed motion in the sentencing

<sup>15</sup> As to the possibility of taking the prisoner's testimony by deposition or affidavit, see *infra* pp. 55-58. Needless to say, the prisoner himself cannot be the judge of whether he is too dangerous to be transported to the District of trial.

court or the scope of the hearing intended to be afforded. What has been set forth above clearly indicates, however, that it was contemplated that, where appropriate, the prisoner would be brought to the sentencing court for hearing. Moreover, the whole tenor of the reports reflects an intention that the motion procedure be a complete substitute for habeas corpus, and that it be effective to afford the prisoner opportunity to present his contentions and have them adjudicated. The provision preserving the habeas corpus remedy where relief by motion was impracticable was included to avoid any possible injustice.<sup>16</sup> But it was contemplated that the motion remedy would ordinarily prove adequate and that resort to habeas corpus would occur only in rare cases. Only on this view would the proposal be effective to achieve its proponents' major purpose of eliminating collateral attack by a different district court. That purpose would be utterly defeated by the holding of the court below that, whenever issues of fact are raised by prisoners confined outside the district, the motion procedure is necessarily inadequate and habeas corpus is the sole remedy. Such a reading would render Section 2255 a nullity in the very cases in which the need for it was deemed most acute by the Conference.

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<sup>16</sup> Compare Judge Parker's statement that "the power to grant relief under habeas corpus where injustice would otherwise result is carefully preserved" (Appendix, p. 172, *infra*).

**B. SECTION 2255 AUTHORIZES A REMEDY IN THE SENTENCING COURT WHICH, IN CASES PRESENTING FACTUAL ISSUES AS IN OTHER CASES, IS FULLY ADEQUATE AND EFFECTIVE TO AFFORD ANY RELIEF TO WHICH THE PRISONER IS ENTITLED**

The court below did not dispute that the scope of the attack which could be made under Section 2255 on a prior judgment of conviction is coextensive with that available on habeas corpus. We think there can be no doubt as to this; Section 2255 authorizes the granting of appropriate relief whenever the sentence is "subject to collateral attack." The grounds for the motion thus "encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed at or prior to the time of the imposition of sentence." *Barrett v. Hunter*, 180 F. 2d 510, 514 (C. A. 10), certiorari denied, 340 U. S. 897.<sup>17</sup> Nor did it deny that the scope of relief authorized was fully adequate to do justice. This, also, is clear on the face of the statute; the court is authorized to "discharge the prisoner or resentence him or grant a new trial or correct the sentence

<sup>17</sup> Accord: *United States v. Wight*, 176 F. 2d 376 (C. A. 2); *United States v. Gallagher*, 183 F. 2d 342 (C. A. 3), certiorari denied, 340 U. S. 913; *Birtch v. United States*, 173 F. 2d 316 (C. A. 4), certiorari denied, 337 U. S. 944; *Hudspeth v. United States*, 183 F. 2d 68 (C. A. 6), certiorari denied, 341 U. S. 942; *Keto v. United States*, 189 F. 2d 247 (C. A. 8); *Hastings v. United States*, 184 F. 2d 939 (C. A. 9); *Hahn v. United States*, 178 F. 2d 11 (C. A. 10); *Smith v. United States*, 187 F. 2d 192 (C. A. D. C.), certiorari denied, 341 U. S. 927.

as may appear appropriate.”<sup>18</sup> It rested its decision that Section 2255 was inadequate and ineffective on its view that that section made inadequate provision for hearing and determination of issues of fact. We think that examination of the provisions of Section 2255 and the practice under the section disclose that the position of the court below is entirely without merit.

1. *Power of the sentencing court to order the prisoner produced for hearing.*—The principal basis for the majority’s decision appears to have been that where the prisoner was confined outside the district the sentencing court was without power to bring him before the court for hearing. Section 2255 plainly contemplates, however, that the prisoner may be produced before the court. The provision that “a court *may* entertain and determine such motion without requiring the production of the prisoner at the hearing” (italics added) reflects an understanding that the court may also require the production of the prisoner, where that course is necessary or appropriate to the determination of the motion or the granting of adequate and effective relief.<sup>19</sup> As we have

<sup>18</sup> Under the habeas corpus statute, which authorized the court to “dispose of the party as law and justice require” (R. S. 761, 28 U. S. C. (1946 ed.) 461), the courts had devised procedures by which, where outright release was not appropriate, the prisoner was transmitted to the sentencing court for re-sentencing or other further proceedings. *In re Bonner*, 151 U. S. 242; *Wilson v. Bell*, 137 F. 2d 716 (C. A. 6); *De Benque v. United States*, 85 F. 2d 202 (C. A. D. C.).

<sup>19</sup> The further provision that where appropriate the pris-

seen, the records of the Judicial Conference (*supra*, pp. 16-31) show beyond question that the judges who drafted and approved the original proposal which became Section 2255 clearly contemplated that under it prisoners would be brought from outside the district when their presence in the sentencing court was necessary or appropriate.

Accordingly, we think no further grant of authority to produce the prisoner is needed. As Judge Pope said below, "It is simply a matter of common sense that a court required to do a job may make the necessary orders to accomplish it" (R. 51). The power to require the prisoner's presence is thus clearly implied from Section 2255 itself.

Any question as to the existence of such authority is removed, however, by the "all writs" statute, 28 U. S. C. 1651, which authorizes federal courts to "issue all writs necessary or appropriate<sup>20</sup> in aid of their respective jurisdictions agreeable to the usages and principles of law." That section authorizes writs of habeas corpus in aid of an existing jurisdiction. *Whitney v. Dick*,

oner may be resentenced or retried also indicates that it was assumed that the prisoner could be brought back to the district of trial. The general practice prior to the enactment of Section 2255 was to have the prisoner produced in court for resentencing. See, e. g., *De Benque v. United States*, 85 F. 1202 (C. A. D. C.); *Wilson v. Bell*, 137 F. 2d 716 (C. A. 6); *McDonald v. Moinet*, 139 F. 2d 939 (C. A. 6).

<sup>20</sup> The words "or appropriate" were added in the 1948 revision.

202 U. S. 132, 136; *Adams v. U. S. ex rel. McCann*, 317 U. S. 269, 272-274; *Price v. Johnston*, 334 U. S. 266. It has been held sufficiently broad to empower a circuit court of appeals to issue a writ "in the nature of a writ of habeas corpus" to bring a prisoner before the court to argue his appeal. *Price v. Johnston*, 334 U. S. 266, 279. In that case this Court held that such a writ could be issued, "where its use is calculated, in the sound judgment of the [court], to achieve the ends of justice entrusted to it" (334 U. S. at 279). The fact that none of the common law writs of habeas corpus had been devised for the particular purpose of producing a prisoner to argue his case was deemed irrelevant; the "all writs" section was held to be not "an ossification of the practice and procedure of more than a century and a half ago," but rather "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'" (334 U. S. at 282). Moreover, the Court emphasized that "the historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause" (343 U. S. at 283). These principles, which permitted use of a writ in the nature of habeas corpus for the novel purpose of bringing a prisoner before an appellate court to argue his appeal, clearly support its use under Section 2255 for the familiar purpose of bringing a

prisoner before a trial court as a witness or a party.

This purpose would seem to be precisely fulfilled by the traditional writs *ad testificandum* and *ad prosequendum*, described by Blackstone (3 Bl. Comm. 129), and by this Court as early as 1807 (*Ex parte Bollman*, 4 Cranch 75, 97-98) and as recently as 1948 (*Price v. Johnston*, 334 U. S. 266, 281). In the *Price* case the Court referred to Blackstone's description of the common law writ as including

(3) *Habeas corpus ad prosequendum, testificandum, deliberandum, etc.*—Issued “when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.”

It is unnecessary, however, to consider whether those common law forms of the writ are exactly adapted for use under Section 2255 (Compare R. 97). “Justice may on occasion require the use of a variation or a modification of an established writ” (*Price v. Johnston, supra*, 283-284).

The majority below thought, however, that such a writ would not lie to reach a prisoner confined outside the district in which the court sits. Nothing in the “all writs” section or in *Price v. Johnston, supra*, contains any suggestion of such a limitation. In a great many cases, the courts have either issued the writ to bring prisoners confined outside the district before the court as

witnesses or, assuming the power to do so, denied the writ in the exercise of their discretion. See *Gibson v. United States*, 53 F. 2d 721 (C. A. 8), certiorari denied, 285 U. S. 557; *United States v. Hunter*, 162 F. 2d 644, 646, 649 (C. A. 7); *Sanders v. Brady*, 57 F. Supp. 87, 89 (D. Md.); *Bugg v. United States*, 140 F. 2d 848 (C. A. 8), certiorari denied, 323 U. S. 673; *Murrey v. United States*, 138 F. 2d 94 (C. A. 8); *Gilmore v. United States*, 129 F. 2d 199 (C. A. 10), certiorari denied, 317 U. S. 631; *Neufeld v. United States*, 118 F. 2d 375, 385 (C. A. D. C.), certiorari denied, 315 U. S. 798; *In re Thaw*, 166 Fed. 71 (C. A. 3); *United States v. Sehon Chinn*, 74 F. Supp. 189 (S. D. W. Va.), affirmed, 163 F. 2d 876 (C. A. 4). In the *Sanders* case, Judge Chesnut stated (57 F. Supp., at 89) that—

This writ can issue in proper cases by the judge in any district in the United States to bring before him any federal prisoner confined in any one of the numerous federal penal institutions in the country.

In the *Gibson* case, the Court of Appeals for the Eighth Circuit observed that the district court's power to issue subpoenas in criminal cases was not limited to the district, and concluded that the power to issue the writ *ad testificandum*—another means of obtaining the presence of a witness—must be equally broad.

Similarly, the writ *ad prosequendum* has often been used to produce for trial a prisoner confined

outside the district. *Downey v. United States*, 91 F. 2d 223 (C. A. D. C.); *Nable v. Botkin*, 153 F. 2d 228 (C. A. D. C.); *Pelley v. Matthews*, 163 F. 2d 700 (C. A. D. C.), certiorari denied, 332 U. S. 811. Cf. *Ponzi v. Fessenden*, 258 U. S. 254; *Ex parte Lamar*, 274 Fed. 160 (C. A. 2), affirmed, 260 U. S. 711; *United States v. Coles*, 88 F. Supp. 150 (D. Ore.). *Contra: Phillips v. Hiatt*, 83 F. Supp. 935 (D. Del.).

The language of 28 U. S. C. 2241, and this Court's decision in *Ahrens v. Clark*, 335 U. S. 188, do not require a contrary result. In relying on these authorities the majority below wholly ignored the fundamental distinction between process which initiates an action and process ancillary to an existing proceeding over which the court has jurisdiction. See *Whitney v. Dick*, *supra*. Section 2241 empowers federal courts and judges to issue writs of habeas corpus "within their respective jurisdictions." Where a court does not otherwise have jurisdiction of the party or subject matter, this provision, as was held in *Ahrens v. Clark*, *supra*, imposes a territorial limitation on the power to issue the writ. In a proceeding to inquire into the cause of a prisoner's detention, only a court within whose district the prisoner is confined may use the writ to acquire jurisdiction over the prisoner and the warden. But on the face of Section 2241, it would seem clear that where a court already has jurisdiction of an existing cause of action, it is "within" its jurisdiction

to issue the writ as ancillary process whenever such issuance is authorized by the "all writs" statute as "necessary and appropriate in aid of [its] jurisdiction." Nothing in *Ahrens v. Clark* purports to limit the power of courts to issue ancillary process, or to overrule the many cases holding that a court having an existing proceeding before it may by writ of habeas corpus issued in aid of its jurisdiction order the production of prisoners confined outside the district. See *supra*, pp. 37-38.

This conclusion is confirmed by the derivation of Section 2241 from R. S. 751, 752, and 753 (28 U. S. C. (1946 ed.) Sections 451-453). Only R. S. 752, which was concerned with "writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty" (the constitutional writ), contained the limiting phrase "within their respective jurisdictions" on which the decision in *Ahrens v. Clark* in large part rested. R. S. 751, empowering the district courts to issue "writs of habeas corpus" generally, contained no such limitation, nor did R. S. 753, which, *inter alia*, permitted the issuance of the writ when "necessary to bring the prisoner into court to testify". The Reviser's Notes merely state that these provisions were consolidated into Section 2241 "with changes in phraseology necessary to effect the consolidation." There was no suggestion of intention to narrow the authority to issue ancillary writs of habeas corpus, which had almost

invariably been assumed to extend outside the district, by the present language empowering judges to grant writs of habeas corpus generally "within their respective jurisdictions". This intention not to change existing law can be given effect if the trial courts are held to have authority to issue ancillary writs in cases already within their jurisdiction—just as they may issue nation-wide subpoenas in certain types of cases. Certainly, there can be no doubt that neither the Revisers nor anyone else meant to curtail the previously existing powers of the court in such cases.

The majority below relied on the statement in *Ahrens v. Clark*, at p. 191, that "it would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ." These considerations, while undoubtedly of force in determining which district court has jurisdiction to initiate a habeas corpus proceeding, have little relevance to the well-settled use of the writ in aid of an existing jurisdiction. We think that where issuance of the writ is necessary to enable the court effectively to exercise its jurisdiction over an existing proceeding, reasons clearly exist for holding that Congress, by the "all writs" section, authorized its issuance. Moreover, the history and purposes of the present statute show that production from a distant district, where

appropriate, was expressly contemplated, partly because it was thought to be easier to transport the prisoner to the district of trial than the other witnesses to the district of confinement. See pp. 27-30, *supra*.

The court below also doubted the adequacy of the writ of *habeas corpus ad testificandum* because it would only produce the prisoner when he was needed to testify as a witness (R. 47). But the writ *ad prosequendum* would seem to be broad enough to cover the production of a prisoner in order to prosecute his own case, when his presence for that purpose is deemed necessary by the court. Since, in this case his own testimony as to his knowledge of the alleged double allegiance of his counsel would doubtless be important, the writ *ad testificandum* was properly sought and the Court need not consider whether the writ must be as closely confined to common law precedent as is seemingly suggested below. See pp. 34-36, *supra*.

It is significant that, so far as we have been able to ascertain, no court has experienced any difficulty in procuring the attendance at a hearing under Section 2255 of a prisoner confined outside the district. In numerous instances prisoners have been brought from outside the district for hearing.<sup>21</sup>

Nor has this power ever been challenged by the Department of Justice, which, of course, has

<sup>21</sup> In Appendix II, *infra*, p. 189, we have listed 23 such cases, based on information reflected in the reported decisions or obtained from the files of the various United States Attorneys. Generally, production of the prisoner has been

custody of federal prisoners. The regulations of the Department of Justice clearly contemplate service of, and compliance with, writs of habeas corpus to secure the presence of prisoners confined outside the district, where ancillary to an existing jurisdiction. Department Circular 2242, (issued December 9, 1931), directs United States Marshals to serve on the warden or superintendent of any federal penal or correctional institution any writ of habeas corpus from a federal court to produce a federal prisoner to testify as a witness or to be prosecuted on some other charge.<sup>22</sup> It provides that upon service of the writ the prisoner shall be surrendered to the custody of the marshal who shall produce him in court in response to the writ and hold him subject to the further order of the court. During such time as he is not required to be in attendance in court the prisoner is to be housed in the nearest suitable available jail. Section 720 of the Marshals' Manual specifies that

accomplished by some form of the writ of habeas corpus. So far as we are informed, power to issue such a writ has been doubted in only one case besides the present. *United States v. Kratz*, 97 F. Supp. 999 (D. Neb.), *infra*, p. 187. In that case the prisoner was, at the court's request, brought within the district by administrative order of the Bureau of Prisons.

<sup>22</sup> This direction is without limitation as to the place of confinement, in so far as it applies to production of a prisoner as a witness in a criminal case or for prosecution. Where the prisoner is desired as a witness in a civil case, the direction is limited to cases in which he is confined within the district, or without the district but within 100 miles of the place of holding court, cases not within these limitations being referred to the Director of the Bureau of Prisons.

the prisoner, while confined in the local jail, will be permitted to receive his "attorney, and other persons with whom it may be necessary for him to confer to prepare properly the defense of his case."<sup>22</sup> See also Sections 51-55 of the Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service.

These provisions, while not specifically addressed to the production of prisoners on motions such as the present, have been construed by the Department as applicable to such motions. We have been advised by the Director of the Bureau of Prisons that it is the practice of federal wardens and superintendents to secure authorization from the Bureau for the transmittal of any prisoner to another district pursuant to a writ and that in no case arising under Section 2255 has such permission been denied. Inquiries which we have made of all United States Attorneys have similarly failed to disclose any case in

<sup>22</sup> A prisoner from Alcatraz is not permitted to have interviews with any person "except those necessary and pursuant to the terms of the writ on which he is produced." This phraseology clearly recognizes the power of the court to make such provision for consultation with counsel and preparation of a case as may appear appropriate.

That ample power exists to afford full opportunity to consult with counsel to prepare a case is illustrated by *United States v. Rogers* (D. Utah) in which the United States Attorney informs us that the prisoner was held within the district for a month prior to the hearing to enable him to prepare his case. (See Appendix II, *infra*, pp. 196-197.) See also *United States v. Monti* (E. D. N. Y.), Appendix II, *infra*, p. 190.

which a writ, issued in connection with a proceeding under Section 2255 for production of a prisoner from outside the district, has not been complied with. See Appendix II, *infra*, p. 187.

Unquestionably, if the district court in this case, in response to respondent's request, ordered the Department to bring him to the district of trial for the purpose of testifying, the Department would have complied in accordance with its uniform policy in similar cases—and particularly since the Department has officially admitted that respondent has a right to be present at the hearing. The court below was so advised in the Government's petition for rehearing. Accordingly, it is plain that the difficulties which disturbed the majority below are wholly unreal.

2. *Right to a hearing.*—The majority below felt also that even if power to produce a prisoner existed, § 2255 denied him any effective right to a hearing. It thought that that section "provides for a hearing on the issues of fact *ex parte* the imprisoned man, of which he is given no notice and at which his body need not be produced" (R. 29). We believe that its opinions reflect a number of misunderstandings of the section. Because of the doubts manifested in the opinions below as to the procedure under § 2255, and because that section does not spell out the procedure in any detail, we think it appropriate to give a fairly detailed statement of what we believe to be the proper procedure. When that

procedure is correctly understood, any contention of inadequacy vanishes.

(a) Section 2255 permits summary dismissal if "the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief." This provision corresponds closely to the first paragraph of § 2243, permitting summary dismissal of a habeas corpus application if it "appears from the application that the applicant or person detained is not entitled" to be released. Such summary dismissal of habeas corpus petitions which on their face are without merit was approved in *Walker v. Johnston*, 312 U. S. 275, 284. Probably the majority of habeas corpus applications filed are thus dismissed summarily.

Section 2255 differs from the comparable habeas corpus provision in expressly permitting the court to look at the outset to the files and record of the case—a difference presumably reflecting the fact that these files and record are already in the sentencing court. A court may take judicial note of its own files and records.<sup>24</sup> The files and record could, however, be brought before the habeas corpus court not only as evidence at a hearing (see §§ 2247, 2249) but also as exhibits to a return filed by the warden. See, e. g., *Waley v. Johnston*, 316 U. S. 101, 103. There can be no question of the propriety of the

<sup>24</sup> *United States v. Pink*, 315 U. S. 203, 216; *Wells v. United States*, 318 U. S. 257, 260; *National Fire Insurance Co. v. Thompson*, 281 U. S. 331, 336, and cases cited.

court's reliance on its own record for such facts as the record may establish and as are not denied by the motion, or to determine whether the questions raised by the motion have been adjudicated at the trial, on appeal, or on a prior application. In addition, we believe that a motion can be dismissed summarily if its allegations are contradicted by the record, which in view of the Court Reporter Act (28 U. S. C. 753) would include all the testimony and all proceedings on arraignment, appeal, and sentence. The general rule on habeas corpus has been that only allegations "not inconsistent with the record" may be considered. *Johnson v. Zerbst*, 304 U. S. 458, 466; see also *Riddle v. Dyche*, 262 U. S. 333, 335. Thus, in *Walker v. Johnston*, *supra*, at 284, this Court said that a habeas corpus petition could properly be dismissed without a hearing on the basis of "incontrovertible facts, such as those recited in a court record." See also *Cochran v. Kansas*, 316 U. S. 255, 256.<sup>25</sup> It is unnecessary, however, to consider now the extent to which that rule is applicable also to motions under § 2255,<sup>26</sup> for in the present case we have made

<sup>25</sup> Some cases have held or said that formal recitals of record, although presumptively correct, may be attacked. See *Centers v. Sanford*, 120 F. 2d 217, 218 (C. A. 5); *Curtis v. Hiatt*, 161 F. 2d 621, 623 (C. A. 3).

<sup>26</sup> One court has assumed that it is applicable. *United States v. Sturm*, 180 F. 2d 413, 414 (C. A. 7). Another court, in permitting a formal recital to be impeached by reference

no contention that facts established of record preclude a hearing on petitioner's allegations.

(b) If the motion is not thus subject to summary dismissal, the court is directed to cause notice to be served on the United States Attorney and to grant a prompt hearing. We think it clear that with the service of notice on the United States Attorney, the proceeding ceases to be *ex parte*, and becomes an ordinary adversary proceeding, in which each party is entitled to be served with any pleadings or affidavits filed by his adversaries, to be notified of any hearing, and, if evidence is taken, to be given adequate opportunity to present evidence and refute his opponent's evidence. The court below seems to have been led to the contrary conclusion by the fact that the first sentence of the third paragraph of Section 2255 states:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served

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to the transcript, has suggested that the rule under Section 2255 should be different than in habeas corpus, on the theory that a motion under § 2255 is a direct and not a collateral attack on the judgment of conviction. *Snell v. United States*, 174 F. 2d 580, 582 (C. A. 10). Compare the power of the sentencing court at any time to correct an illegal sentence and to correct clerical mistakes. Fed. Rules of Crim. Proc., Rules 35 and 36; *Downey v. United States*, 91 F. 2d 223 (C. A. D. C.).

upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. \* \* \*

The court below construed this provision as meaning that "the only notice of the hearing" was to be given the United States (R. 30). But the notice referred to in the statute is notice of the *motion*. The United States would not be aware of the motion if the United States Attorney were not notified. The statute says nothing, however, as to notice of the date of the hearing. Since it is the prisoner to whom the court is directed to "grant a prompt hearing" it would seem obvious that he was intended to be notified. Insofar as we are aware, in all courts all parties are notified of the date of hearings, usually by the clerk. Doubtless it was not thought necessary to include an express provision to that effect in Section 2255. But the statute certainly cannot be read as providing for a hearing with notice only to the United States and not to prisoners, for such a proceeding would not accord a "hearing" in any ordinary sense. It may be noted that §§ 2243 and 2245 make no express provision for service of the return or answer on the prisoner in a habeas corpus proceeding, or for notice to either party of a hearing or of the taking of deposition; yet we think plainly all are contemplated and implied.

(e) Although the statute does not so provide, we think it is entirely appropriate, prior to

setting the motion down for hearing, to adopt procedures to clarify and make specific the issues. In *Walker v. Johnston*, 312 U. S. 275, this Court approved such a procedure in habeas corpus despite the absence of any statutory provision for it. It said (at p. 284) :

Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge.<sup>27</sup> This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to

<sup>27</sup> Similarly, relief has been granted under § 2255 without a hearing. *Snell v. United States*, 174 F. 2d 580 (C. A. 10).

the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.<sup>28</sup>

The same function of rendering specific the "often inconclusive" allegations of a motion may be served by an answer by the United States attorney, to which the moving party might be required to respond.<sup>29</sup> Further proceedings to clarify the issues would also seem permissible where appropriate.<sup>30</sup>

(d) If, from the pleadings as thus made specific, issues of fact emerge, the statute requires a hearing. Since the motion is not part of the

<sup>28</sup> The practice thus approved is now embodied in 28 U. S. C. 2243. Indeed, under that section issuance of the writ now has the same effect as issuance of a show cause order; it merely calls upon the warden to answer and the prisoner is not required to be produced until a hearing is held after the answer is filed.

<sup>29</sup> In a number of districts the practice of filing an answer has been followed, see Appendix II, pp. 187-197, *infra*. Other procedures adapted to the same purpose might be a motion to dismiss, *United States v. Fleenor*, 177 F. 2d 482 (C. A. 7), a. 1 a show cause order, *United States v. Calp*, 83 F. Supp. 152 (D. Md.).

<sup>30</sup> Thus, in *United States v. Calp*, *supra*, n. 29, after the petitioner filed a general traverse to the United States Attorney's return to the show cause order, the court directed the clerk to write the prisoner calling attention to certain specific statements in the record apparently contradicting his allegations, and to the fact that, although he contended that coercion practiced in obtaining a confession which was not used vitiated his subsequent plea of guilty, he did not now deny his guilt. The letter gave permission to file a more specific reply or affidavit which the prisoner failed to do. The court thereupon dismissed the motion without hearing.

original proceeding (*Bruno v. United States*, 180 F. 2d 393 (C. A. D. C.)), it would seem that the hearing is essentially civil in nature, as it is in habeas corpus. *Ex parte Tom Tong*, 108 U. S. 556. In habeas corpus the prisoner has no right to be confronted with the witnesses against him. See *Burgess v. King*, 130 F. 2d 761 (C. A. 8); *Irvin v. Zerbst*, 97 F. 2d 257 (C. A. 5), certiorari denied, 305 U. S. 597. The 1948 amendments expressly authorize the court to take evidence by deposition or, with certain safeguards, by affidavit in habeas corpus cases. 28 U. S. C. 2246. We see no reason why depositions or affidavits may not similarly be used under § 2255, provided the prisoner or his counsel are given adequate opportunity to put questions to the deponent or affiant, orally or in writing, and to offer counter evidence.<sup>31</sup> But we think the requirement that the motion be set for hearing unless "the motion and the files and record of the case" conclusively show that the prisoner is entitled to no relief clearly means that any evidence other than the files and record which the judge considers in disposing of the motion must be received in a manner which gives the prisoner an opportunity to respond to it. It is for this reason that we think that the action of the district court in taking evidence *ex parte* was unauthorized here.<sup>32</sup>

<sup>31</sup> Compare the requirement of § 2246 that "If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits."

<sup>32</sup> A similar procedure was followed in *Crowe v. United*

(e) Section 2255 differs from habeas corpus as to the requirement of the prisoner's presence at the hearing. Production of the prisoner at habeas corpus hearing is required by § 2243 unless the hearing involves only issues of law.<sup>33</sup> Production at a § 2255 hearing, on the other hand, is discretionary. The court "may \* \* \* de-

States, 175 F. 2d 799, 801 (C. A. 4). There the trial judge "investigated the charges contained in the motion" by examining under oath the United States Attorney, F. B. I. agents, and the prisoner's trial counsel, all, apparently without notice to the prisoner. The Court of Appeals, in affirming the denial of the motion, considered their evidence with apparent approval of the practice followed. A similar practice has been followed in at least one other district within the Fourth Circuit. (See Appendix II, p. 194, *infra*.)

In the *Crowe* case, the Court of Appeals also thought that the motion could have been denied on its face, as raising issues which could and should have been presented at the trial and which had been adjudicated on a prior application. Similarly, Judge Pope thought the present motion could have been denied on its face (R. 41-43) and that the testimony taken was immaterial (R. 43). Thus, in both cases the trial judge may have acted on the theory that, although he was prepared to deny the motion on its face, he wished to make doubly sure of its lack of merit by conducting an *ex parte* investigation. For reasons indicated, however, we think the taking of evidence *ex parte* is unauthorized.

<sup>33</sup> This requirement is not contradicted or curtailed by the provision of § 2246 that evidence may be taken by deposition or, in the discretion of the court, by affidavit. The Judicial Conference proceedings clearly show that the latter provision, drafted by the Conference, was not intended to modify or restrict the right of the prisoner to be produced in court, as established in *Walker v. Johnston*, 312 U. S. 275. The supplemental report of the habeas corpus committee, submitted to the Conference in 1943, states:

"Your Committee considered a suggestion to the effect that

termine such motion without requiring the production of the prisoner at the hearing."<sup>34</sup>

Two views have been expressed as to the criteria which should govern the court's discretion in ordering a prisoner produced. The Court of Appeals for the Fourth Circuit has said in *Crowe v. United States*, 175 F. 2d 799, 801:

Only in very rare cases, we think, will it be found necessary for a court to order a prisoner produced for a hearing under 28 U. S. C. A. § 2255. \* \* \* Production of the prisoner should not be ordered merely because he asks it, but only in those cases where the court is of opinion that his presence will aid the court in arriving at the truth of the matter involved.<sup>35</sup>

On the other hand the Court of Appeals for the Tenth Circuit in *Barrett v. Hunter*, 180 F. 2d 510, 514, certiorari denied, 340 U. S. 897, has stated:

We do not think it was intended by such provision to give the court an absolute discretion. Rather, we think, the intention

is that a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect."

See also the Reviser's Note to § 2243, stating that:

"The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*."

<sup>34</sup> This provision was not in the Judicial Conference draft; it was added by the Revisers without explanation.

<sup>35</sup> In that case, however, the court also said that the motion

was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the prisoner is unnecessary to afford him the relief to which he is entitled, or where only issues of law are presented. But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the Court should require the production of the prisoner.<sup>36</sup>

Thus, apparently the Fourth Circuit would require the prisoner's presence only when his testimony in open court is deemed necessary to aid the court in determining the issues, while the could properly have been denied on its face (see Note 32, *supra*).

Compare *Carvell v. United States*, 173 F. 2d 348 (C. A. 4): "It would destroy all prison discipline if merely by filing a motion with no more merit than the one here, prisoners could have themselves transported about over the country for the purpose of testifying on the hearing of such motions."

<sup>36</sup> In *Cherrie v. United States*, 179 F. 2d 94 (C. A. 10); the trial judge had denied a motion without hearing, resting his decision in part on his recollection of the trial; the Court of Appeals reversed, holding that since the record did not clearly disclose an intelligent waiver of the right to counsel, the moving party was entitled to a hearing. On remand, *United States v. Cherrie*, 90 F. Supp. 261 (D. Wyoming), the prisoner was apparently brought from Leavenworth to Wyoming for a hearing and the court made findings that the waiver was intelligent, which were affirmed on appeal. *Cherrie v. United States*, 184 F. 2d 384 (C. A. 10).

Tenth Circuit would generally require his presence whenever a factual issue was to be tried. These expressions may reflect only a difference in emphasis. There appear, however, to be appreciable differences in the practice of the various district courts. The majority of United States Attorneys have furnished us with statements of the practice in their districts, which we have summarized in Appendix II, *infra*, pp. 187-197. Those statements indicate that in a number of districts it is the fairly uniform practice, whenever issues of fact are presented which cannot be resolved from the motion and the files and record, to have a hearing in open court at which the prisoner is present (E. g., S. D. Ga., N. D. Iowa, W. D. La., N. D. Ohio, N. D. Okla., W. D. Okla.). In other districts, however, the practice of taking the prisoner's testimony by deposition or affidavit without producing him at a hearing, and of protecting his rights by appointment of counsel for him, by furnishing him with a copy of any testimony taken at a hearing, and by other means, has been generally used (E. g. S. D. Ind., E. D. La., E. D. Mo., S. D. N. Y., E. D. N. C., M. D. N. C., W. D. N. C.).

We think it clear that the presence of the prisoner at a hearing under § 2255 is not required every time factual issues are raised on which the court receives evidence outside the files and record of the case. If Congress had intended so to require, it would doubtless have used the formula

which it used, in the same chapter of the revised Code, in Section 2243.<sup>37</sup> Particularly since the Court Reporter Act, 28 U. S. C. 753, now minimizes the area of possible dispute over many factual issues, there may well be a number of situations in which representation by counsel at a hearing in court is adequate, or in which the entire proceeding can be conducted by deposition and affidavit without the taking of any testimony in open court. Compare *Boone v. Lightner*, 319 U. S. 561; *Cross v. Williams*, 149 F. 2d 84 (C. A. 8). One example is suggested by *United States v. Gallagher*, 94 F. Supp. 640 (W. D. Pa.), in which the only factual issue was as to the correct name of the prisoner.<sup>38</sup> There may well be others in which the testimony of the prisoner is not offered, or is immaterial, or would, if received, be so brief and of such a character as not to justify the expense of transporting him. When other methods of giving the prisoner a fair hearing are employed, the denial of an absolute right to be present does not render the procedure inadequate in the statutory sense.

As we point out below, *infra*, pp. 74-79, at the time of the adoption of the Constitution and for

<sup>37</sup> Section 2243 provides: "Unless the application for the writ and the return present only issues of law, the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 2243, like the quoted sentence of Section 2255, was drafted by the Revisers and not by the Judicial Conference.

<sup>38</sup> The United States Attorney has confirmed that the prisoner was not produced in this case. The court granted the prisoner's motion.

a century thereafter, a convicted person had no right to be released on habeas corpus because of a denial of constitutional right in the proceedings leading to his conviction. Moreover, the right on habeas corpus to a hearing of issues of fact outside the record is derived from statutes greatly liberalizing the habeas corpus procedure over what it was when the Constitution was adopted. As this Court said in *Walker v. Johnston*, 312 U. S. 275, 285, on the question whether on habeas corpus factual issues could be disposed of on affidavits without the production of the prisoner, or only by a hearing in open court at which the prisoner is produced:

It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

As we said in *Johnson v. Zerbst*, 304 U. S. 458, 466, "Congress has expanded the rights of a petitioner for habeas corpus."

Congress undoubtedly has power to alter procedures which it itself has created. In view of the absence of any constitutional requirement that the prisoner be present, and in view of the textual evidence in § 2255 that Congress did not intend to impose an absolute requirement of his production, we do not believe that the production of the prisoner in every case can be said to be necessary.

to make the motion procedure adequate and effective within the meaning of § 2255.

We do not dispute, however, that where substantial issues of fact are presented on which the testimony and credibility of the prisoner is important, he should, absent special circumstances, be produced. For this reason, we agree with the court below that, because of respondent's importance as a witness upon the crucial question presented by his motion, he should be produced at the hearing. This will enable him to be present during the hearing for other purposes than as a witness, just as in habeas corpus. Since the remedy by motion will thus be clearly adequate in the present case, we believe it is unnecessary at this time—even if it were possible—to attempt to define or catalogue the considerations which might justify a court in declining to produce a prisoner in other circumstances.

(f) The opinion below contains some suggestion that the remedy under § 2255 is also inadequate because it fails to provide for as prompt a hearing as would be afforded on habeas corpus. Reliance is placed for this on the fact that § 2243 sets very short time limits on the filing of a return and on the date of hearing. These limits can, however, be extended for good cause shown. Section 2255 requires the court to grant a "prompt hearing" on the motion. There would thus appear to be no difference in spirit between the two procedures, and no reason why relief by motion should not be as expeditious as relief by habeas corpus.

**C. IN ANY EVENT, THE COURT SHOULD NOT HAVE HELD THE MOTION REMEDY INADEQUATE BEFORE THAT REMEDY HAD BEEN PURSUED TO COMPLETION**

The foregoing clearly shows that the motion remedy was intended to be an adequate substitute for habeas corpus in cases presenting factual issues as in other cases; that the section authorizes procedures capable of carrying out that intention; and that there is no reason to anticipate that it will not prove adequate and effective. Even if the matter were more doubtful than it is, however, we believe that orderly procedure requires that the motion remedy be pursued to completion before resort to habeas corpus can be permitted. In general, a requirement of resort to an exclusive procedure cannot be avoided unless that procedure is plainly incapable on its face of affording relief.<sup>29</sup> Thus, the requirement of exhaustion of state remedies as a condition to application to a federal court for habeas corpus by a state prisoner, *Darr v. Burford*, 339 U. S. 200, has been insisted upon despite a showing that the adequacy and availability of the state remedy was very doubtful. See *Marino v. Ragen*, 332 U. S. 561, 563 (concurring opinion); *Young v.*

<sup>29</sup> Cf. *Yakus v. United States*, 321 U. S. 414, 435:

"Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it \* \* \*"

*Ragen*, 337 U. S. 235. This policy is particularly applicable where the prescribed procedure is in a federal court, so that the court of appeals and this Court have full power to correct a denial of procedural right, should any occur. Cf. *Yakus v. United States*, 321 U. S. 414, 434.

Accordingly, we think that, once the errors into which the district court fell had been corrected by the Government's concession that the prisoner was entitled to be present at a hearing, the court of appeals should have remanded the cause for hearing. Only if, after hearing, it appears that it is impossible under § 2255 to afford respondent adequate opportunity for an adjudication of his contentions would a habeas corpus petition become appropriate. We are confident that a remand will show that the difficulties which troubled the majority below are nonexistent.<sup>40</sup>

<sup>40</sup> There may be unusual circumstances not here present in which it could be said, in advance of resort to it, that the motion remedy would be inadequate. This might occur if, in time of war, communications with the district in which the prisoner was sentenced had been cut off; or if execution of a death sentence was imminent (although even there the better practice would seem to be for a habeas corpus court merely to stay execution until application to the sentencing court could be made). One district court has suggested that resort to habeas corpus might be permitted if the sentencing court was unduly delaying action on the motion. *St. Clair v. Hiett*, 83 F. Supp. 585, 587 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967.

## II

**SECTION 2255 IS NOT A SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS WITHIN THE MEANING OF ART. I, SECTION 9, OF THE CONSTITUTION**

**A. THE CONSTITUTION GIVES CONGRESS BROAD POWER TO REGULATE THE JURISDICTION OF FEDERAL COURTS TO ISSUE WRITS OF HABEAS CORPUS AND THE PROCEDURE UPON SUCH WRITS.**

The majority of the court below appears to have regarded the constitutional guaranty against suspension of the writ of habeas corpus as fixing immutably various details of habeas corpus procedure as it existed in 1789. The framers of the Constitution, in this area as in others, carefully avoided placing the law in any such strait-jacket. Their concern was to guard against the denial of any remedy to one unlawfully detained, not to prescribe procedural details. This is clearly shown by the discussions attending the adoption of Article I, § 9, of the Constitution, the historical evils at which that provision was aimed, the subsequent practice of Congress in prescribing the scope of and procedure on habeas corpus, and the uniform course of judicial decision recognizing the validity of that practice.

The only mention of the writ of habeas corpus in the Constitution is the provision of Article I, § 9, cl. 2, that:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The discussions attending the adoption of this provision illustrate the breadth of the framers' objective. Charles Pinckney offered the following motion to the constitutional convention (5 Elliot's *Debates* 445):

The privileges and benefit of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding — months.<sup>41</sup>

When Pinckney's motion came up for discussion, Madison's notes contain the following entries (5 Elliot's *Debates* 484):

Mr. Rutledge was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the states.

<sup>41</sup> Pinckney's draft was apparently taken from the Massachusetts Constitution of 1780 which provided (c. 6, art. 7): "The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months." The New Hampshire Constitution of 1784 contained a similar provision with suspension limited to three months. The Georgia Constitution of 1777 provided: "The principles of the *habeas corpus* act shall be a part of this constitution." No other constitution in force at the time of the convention referred to the writ, although some contained provisions against the suspension of statutes generally.

Mr. Gouverneur Morris moved, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

The Morris motion carried. All agreed to the part reading: "The privilege of the writ of *habeas corpus* shall not be suspended"; North Carolina, South Carolina, and Georgia voted against the "unless" clause. Subsequently the word "where" was changed by the committee on style to read "when," and the provision became part of the Constitution.

The provision thus adopted was in negative form; it did not affirmatively declare the right of an imprisoned person to the writ. Four of the state ratifying conventions, apparently deeming this inadequate, proposed the inclusion in a bill of rights, to be added to the Constitution, of an affirmative guaranty of the privilege of *habeas corpus*. The New York convention proposed the following (1 Elliot's *Debates* 328):

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of

public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*.

Virginia (3 *id.* 658), North Carolina (4 *id.* 243), and Rhode Island (1 *id.* 334) suggested the following (with slight variations in punctuation):

That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

However, when the First Congress proposed a bill of rights consisting of twelve amendments to the Constitution, of which ten were later ratified, none of the proposed amendments was concerned with the writ of *habeas corpus*.

The foregoing clearly indicates, we think, that the framers of the Constitution were concerned merely with assuring the availability of *some* remedy for persons unlawfully detained, and that they had no thought of prescribing the procedural details of that remedy. The evils at which the clause was evidently directed bear this out. Despite the common law decisions and statutes establishing the writ in England, the Crown had on numerous occasions succeeded in frustrating all inquiry into the cause of a man's detention. It was such a total denial of any remedy for unjust detention that the framers had in mind in prohibiting suspension of the writ.<sup>42</sup>

<sup>42</sup> For the creation and development of the writ in England, and for examples of its suspension or frustration, see Church, *Habeas Corpus* (2d ed. 1893); Hurd, *Habeas Corpus* (2d ed.

Although the origins of the writ in England are somewhat obscure, it had by the 17th Century become established as the appropriate process for checking illegal imprisonment by public officials or inferior courts. In *Darnel's Case*, 3 How. St. Tr. 1 (1627), the court held that the command of the King (*per special mandatum regis*) in the form of a warrant of arrest signed by two members of the privy council, was a sufficient answer to the writ, against defense objections that even the privy council had to assign a sufficient cause of commitment. Section 5 of the Petition of Right, 3 Car. I, c. 1 (1627) to which the King consented in return for certain financial considerations, reflects the concern which this decision caused; it recited that contrary to the Great Charter and good laws and statutes of the realm, divers of the King's subjects had "of late been imprisoned without any cause" shown, and when they were brought up on habeas corpus, no cause was shown but the special command of the King, yet they were nevertheless remanded to prison. It was therefore prayed that "no freeman, in any such manner as is before-mentioned [shall] be imprisoned or detained." Subsequently an act

1876); 9 Holdsworth, *History of English Law*, 112 *et seq.* (1932); 2 Hallam, *History of the Middle Ages*, Chapter 8 (1862); Glass, *Historical Aspects of Habeas Corpus*, 9 St. Johns L. Rev. 55 (1934); Jenks, *The Story of the Habeas Corpus*, 18 L.Q. Rev. 64 (1902); Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F. R. D. 179.

of 1640, abolishing the Star Chamber, 16 Car. I, c. 10, specifically authorized use of the writ to test the legality of commitments by command or warrant of the King or privy council.<sup>43</sup>

The Habeas Corpus Act of 1679, 31 Car. II, c. 2, definitively established the availability of the writ and fixed its procedural aspects for the next 131 years. Examination of the provisions of this Act, which was hailed as a great landmark of liberty, forcefully illustrates the narrow scope of the rights protected by the writ in the 17th and 18th centuries as compared with modern conceptions of it. The Act was available only to persons held on charge of crime (Sec. III).<sup>44</sup> Upon issuance of the writ and the return thereto the prisoner was entitled to be released upon giving appropriate recognizances to appear at the next term at a court where the offense with which he was charged was properly cognizable, unless it appeared that the offense was not bailable (Sec. III). Persons charged with treason or felony "plainly and specially expressed in the warrant of commitment" were not eligible to apply for the writ; they were, however, guaranteed the right to be indicted at the next succeeding session (or the second succeeding session if the Crown's witnesses

<sup>43</sup> The colonists were familiar with these events; the arguments in *Darnel's Case* were printed in pamphlet form and circulated in the colonies. Hurd, *Habeas Corpus* (2d ed., 1876), pp. 101-102.

<sup>44</sup> Persons imprisoned for debt were expressly excepted (Sec. VIII).

could not be ready sooner) or bailed (Sec. VII). "Persons convicted or in execution by legal process" were altogether excluded from the benefits of the Act (Sec. III). Within these limits the Act made important procedural advances. The writ could be issued in term time or vacation by any superior court judge (i. e., the Chancellor, any Justice of King's Bench or Common Pleas, and the barons of the Exchequer) (Sec. III).<sup>45</sup> Times were set forth within which the return was to be made and the writ adjudicated (Sec. III). Any sheriff or other jailer who refused to comply with the writ was subject to punishment (Sec. V). Any judge who unlawfully denied a writ was subject to a large forfeiture to the person aggrieved (Sec. X).

The provisions of this Act were, however, suspended on numerous occasions by act of Parliament which had the effect of making 31 Car. II, c. 2, temporarily inoperative, usually as to a limited class of persons such as those suspected of treason against the King. Thus, the Habeas Corpus Act was suspended because of conspiracies against the King in 1688 (1 Wm. & Mary I, c. 2,

<sup>45</sup> Previously only the Chancellor and the judges of King's Bench had had the undoubted right to issue the writ. Hurd, *Habeas Corpus* (2d ed. 1876) 96. And these judges were either unable or unwilling to issue the writ except during the legal term, which lasted about six months of every year. For example, in *Jenkes' Case*, 6 How. St. Tr. 1190, the chancellor refused the writ in vacation to a man committed by the King in council for making a speech advocating the calling of a new Parliament.

7, 19) and again in 1696 (7 & 8 Wm. III, c. 11). Activities of the Jacobites resulted in suspension in 1714 (1 Geo. I, st. 2, c. 8; 30), 1722 (9 Geo. I, c. 1), and 1744 (17 Geo. II, c. 6). See *King v. Earl of Orrery*, 88 Eng. Rep. 75 (1722)). The American Revolution caused suspension as to persons suspected of treason or piracy. 17 Geo. III, c. 9; 18 *id.*, c. 1; 19 *id.*, c. 1; 20 *id.*, c. 5; 21 *id.*, c. 2; 22 *id.*, c. 1; see 2 *Works of Edmund Burke* 1-42.

Suspension occasionally amounted to bills of attainder and named specific individuals. Thus, the act was suspended as to six named individuals arrested as conspirators in a plot to assassinate William III in 1696. 7 & 8 Wm. III, c. 11. Other statutes authorized later rulers to continue the detention. 8 Wm. III, c. 5; 9 Wm. III, c. 4; 10 & 11 Wm. III, c. 13; 1 Ann., st. 1, c. 29; 1 Geo. I, st. 2, c. 7; 1 Geo. II, st. 1, c. 4; *Case Against Bernardi*, 13 How. St. Tr. 759.<sup>66</sup>

The statute 17 Geo. III, c. 9 (1777), *supra*, will serve as an example of a suspension act. It provided:

\* \* \* That all and every person or persons who have been, or shall hereafter be seized or taken in the act of high treason committed in any of his Majesty's colonies or plantations in America, or on the high seas, or in the act of piracy, or who are or shall be charged with or suspected of the crime of high treason, \* \* \* or of piracy, \* \* \* may be thereupon secured and de-

<sup>66</sup> The last survivor of the six died in Newgate in 1736. *Looking Back*, 91 Sol. J. 515 (1947).

tained in safe custody, without bail or mainprize, until the first day of *January*, one thousand seven hundred and seventy-eight; and that no judge or justice of the peace shall bail or try any such person or persons without order from his Majesty's most honorable privy council \* \* \*, any law, statute, or usage, to the contrary in any-wise notwithstanding.

This suspension was extended annually until January 1, 1883, see p: 68, *supra*. In other words, suspension in England was a legislative enactment which caused the *Habeas Corpus* Act to cease to operate, allowing confinement without bail, indictment, or other judicial process.

A similar suspension occurred in Massachusetts shortly before the Constitutional Convention. During Shay's Rebellion in 1786-1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." Mass. Laws 1786, c. 41.<sup>47</sup>

In short, as the debates in the Convention indicate

<sup>47</sup> For general discussions of the writ in the colonies see 2 Channing, *History of the United States* 221, n. 1 (1937); Goebel, *Law Enforcement in Colonial New York* 260, 288, 502-506 (1944); Hurd, *Habeas Corpus* 95-104 (2d ed. 1876); Glass, *Historical Aspects of Habeas Corpus*, 9 St. Johns L. Rev. 55, 63-64 (1934).

(see *supra*, pp. 62-64), the concern of the framers was over the power, which had been repeatedly exercised in England, to effect a total suspension of the privilege of the writ. The purpose of the clause was to provide that such a total suspension could occur only in time of war or rebellion and then only if the public safety required it.<sup>48</sup>

<sup>48</sup> This power to suspend the privilege in time of war or rebellion has several times been exercised or sought to be exercised. In 1807, after the exposure of the Burr conspiracy, Jefferson proposed a suspension of the writ for three months in cases of treason or other high crime or misdemeanor. The measure passed the Senate with one dissent but was defeated in the House. See 16 *Annals of Congress*, 44, 402 *et seq.*, 531-535; *Beveridge, Life of John Marshall*, 343-348. Lincoln, without legislative authority, suspended the writ or authorized its suspension on several occasions early in the Civil War. See 6 Richardson, *Messages and Papers of the Presidents*, 16-19, 24-25, 98-99; *Ex Parte Merryman*, Fed. Cas. No. 9,487 (C. C. D. Md.). In 1863 Congress authorized suspension of the writ; the Act (Act of March 3, 1863, 12 Stat. 755) provided that:

“\* \* \* during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.”

The privilege of the writ was also suspended in the Con-

Congress has repeatedly acted on the assumption that it has power to regulate procedure in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of federal courts to issue it. The Judiciary Act of 1789, Sec. 14, 1 Stat. 81, contained the following brief provision, intended to provide "efficient means by which this great constitutional privilege should receive life and activity" (*Ex Parte Bollman*, 4 Cranch 75, 95) : —

*And be it further enacted*, That all the before-mentioned courts of the United States, shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case

federacy. *In re Cain*, 60 N. C. 525, 2 Winston 141; *State v. Sparks*, 27 Tex 705.

The Act of April 20, 1871, gave the President the power to suspend the writ in an attempt to combat the Ku Klux Klan. 17 Stat. 13. For a time in the fall of 1871, the privilege was denied in nine South Carolina counties. 7 Richardson, *Messages and Papers of the Presidents*, 136-138, 150-151. The writ was suspended in Cavite and Batangas in 1905. *Fisher v. Baker*, 203 U. S. 174. It was suspended in Hawaii in 1941. *Duncan v. Kahanamoku*, 327 U. S. 304.

extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

This provision clearly prohibited inquiry into the cause of detention of prisoners confined under state process. *Ex parte Dorr*, 3 How. 103. The availability of the writ was extended in 1833 to federal officers in state custody for acts in carrying out federal laws (Act of March 2, 1833, 4 Stat. 632, 634; see *In re Neagle*, 135 U. S. 1), and in 1842 to certain foreign nationals held by state officers (Act of August 28, 1842, 5 Stat. 539).

In 1867, to facilitate enforcement of the Reconstruction Acts, (2 Warren, *The Supreme Court in United States' History* (rev. ed.), 464), the federal writ was drastically extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." Act of February 5, 1867, 14 Stat. 385. In this Act Congress for the first time made detailed regulations of the procedure on all applications for the writ. By the Act of March 27, 1868, 15 Stat. 44, Congress temporarily withdrew the jurisdiction of the Supreme Court to hear appeals from denials of the writ. See *Ex parte McCordle*, 7 Wall. 506. The provisions of the 1867 Act were codified in the Revised Statutes of 1874 and 1878. This statutory framework re-

mained substantially unchanged (with the exception of some modifications in the appellate procedure) (see 28 U. S. C. (1946 ed.) 451-466), until the revision and enactment of Title 28 in 1948.

The power of Congress thus to prescribe the attributes of the writ has never been doubted. The principle was laid down by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 94, that "the power to award the writ by any of the courts of the United States, must be given by written law"—i. e., by statute.<sup>49</sup> This holding has been adhered to without exception. E. g., *Ex parte Dorr*, 3 How. 103; *Ex parte McCordle*, 7 Wall. 506; *Whitney v. Dick*, 202 U. S. 132; *Ahrene v. Clark*, 335 U. S. 188; *Darr v. Burford*, 339 U. S. 200, 210-214. Similarly, the power of Congress to regulate habeas corpus procedure has never been questioned. E. g., *Frank v. Mangum*, 237 U. S. 309, 331; *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 274. As this Court said of the issue before it in *Walker v. Johnston*, *supra*, 312 U. S. at 285:

It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

<sup>49</sup> Marshall excepted from this statement the inherent powers of courts "over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions."

B. IN THE EXERCISE OF THAT POWER CONGRESS COULD, IN THE CASE OF CONVICTED PERSONS, VALIDLY SUBSTITUTE FOR HABEAS CORPUS A REMEDY IN THE SENTENCING COURT

Any suggestion that the Constitution imposed an inflexible procedure on habeas corpus, or adopted the act of 31 Car. II, c. 2, is not only textually and historically unsound, but also self-defeating as applied to the remedies available to attack a judgment of conviction. For it is clear that at the time of the Constitution habeas corpus was never conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The English Act of 1679, 31 Car. II, c. 2, which was in force in England in 1789, expressly excepted "persons convict or in execution by legal process" from those eligible to apply for the writ. (Sec. III; see p. 67, *supra*.) Similarly at common law the rule that a convicted person did not have the privilege of the writ had been applied. See Dicey, *Law of the Constitution*, 217-218.

State legislation in the United States at about the time of the Convention was generally patterned on the English Act. See 2 Kent, *Commentaries* 28. Typically the state acts likewise expressly excluded convicted persons from their benefits. See Maryland, Act of Jan. 6, 1810, ch. cxxv ("not being convict or in execution by legal process"); Massachusetts, Laws, 1784, c. 72 ("persons convict or in execution by legal process"); New Hampshire, Act of June 26, 1815, c. 45

("unless the complainant be convict, or in execution by legal process, criminal or civil"); New Jersey, Act of Mar. 11, 1795, c. dxxxvi ("other than persons convict, or in execution by legal process"); New York, Laws of 1801, c. 65 ("other than persons convict or in execution by legal process").<sup>50</sup>

In the federal courts, under acts of Congress prior to that of 1867, it was the settled rule that a showing that the applicant was held pursuant to a conviction by a court of general criminal jurisdiction ended the inquiry. Once the jurisdiction of the court over criminal matters was shown, its decision was deemed *res judicata* as to all matters affecting the validity of the conviction and sentence. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Watkins*, 7 Pet. 568, 574; see *Ex parte Yerger*, 8 Wall. 85, 101; *Frank v. Mangum*, 237 U. S. 309, 330-331. Although the Court is not faced with any such question, the fact that the writ of habeas corpus as it existed when the Constitution was adopted did not extend to convicted criminals indicates that even the complete abolition of the right to the writ for such persons would not be a suspension in contravention of Article I, clause 9.

<sup>50</sup> As to Georgia, see note 41, p. 62, *supra*, and *State v. DeLois Maurignos*, T. U. P. Charlton Rep. 24 (1805) which states that the "habeas corpus act, 31 Carolus 2. chap. 2, sec. 7, \* \* \* is adopted by our constitution and our laws \* \* \*."

The Act of 1867, 14 Stat. 385, was, however, the basis for drastic expansion in the scope of inquiry on the writ. That Act contained two provisions of primary significance for present purposes. It provided that federal courts and judges

in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.

In addition, it made a major change in habeas corpus procedure by providing that "the petitioner may deny any of the material facts set forth in the return, or may allege any fact \*\*\*" and that the court or judge "shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested." This Court described the change made by the latter provision in *Frank v. Mangum, supra*, at 330-331:

The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

These provisions of the 1867 Act, together with a growing concern of this Court for the procedural guarantees of due process in criminal cases, became the basis for a series of holdings that, where denial of constitutional right was asserted, judgments of conviction by state and federal courts could be reexamined on habeas corpus, and evidence outside the original criminal record could be taken on the question whether constitutional rights had been violated. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *Adams v. United States ex re McCann*, 317 U. S. 269; *House v. Mayo*, 324 U. S. 42; *Von Moltke v. Gillies*, 332 U. S. 708; *Price v. Johnston*, 334 U. S. 266.

Thus the decisions on which respondent necessarily relies in his claim for relief from his criminal conviction stem, not from any command of Art. I; Sec. 9 of the Constitution, but from the jurisdiction conferred and procedure created by the 1867 Act. See *Johnson v. Zerbst*, *supra*, at 466; *Walker v. Johnston*, *supra*, at 285-6. To the extent that they may have constitutional basis it would rest in an implication from the due process clause that where a conviction has been rendered in violation of constitutional right some corrective process must be supplied. Thus in *Johnson v.*

*Zerbst, supra*, at 467; this Court deemed it necessary that the writ should issue because

no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*.

And in *Waley v. Johnston, supra*, at 104-105, this Court emphasized that

use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. [Emphasis added.]

In short, *habeas corpus* developed as a remedy in these cases because the language of the 1867 Act permitted it and because, in the absence of any other remedy, it appeared to be the only means of preserving constitutional rights. We think there can be no doubt of the power of Congress to replace *habeas corpus* in this area with a substitute remedy of equivalent scope in the sentencing court. The reasons which impelled Congress to the change are clearly set forth in the materials already quoted from the Judicial Conference. See *supra*, pp. 16-31. And we think

the discussion in Part I of this Brief amply shows that the new remedy affords an adequate means of redressing any violation of constitutional right.

This Court dealt with a similar question in cases coming from state courts. In various types of situations a number of states, while denying relief in habeas corpus, permit a prisoner to attack his conviction in the sentencing court by writ of error or proceeding *coram nobis*.

This Court has invariably stated or assumed that such a remedy in the sentencing court, if clearly available, satisfies a state's obligation to provide an adequate corrective process for any denial of constitutional right occurring in a criminal trial. E. g., *New York ex rel. Whitman v. Wilson*, 318 U. S. 688; *Ex parte Hawk*, 321 U. S. 114; *Marino v. Ragen*, 332 U. S. 561; *Young v. Ragen*, 337 U. S. 235; *Darr v. Burford*, 339 U. S. 200. It has recognized that "of course [a state] may choose the procedure it deems appropriate for the vindication of federal rights." *Young v. Ragen*, *supra*, 337 U. S. at 238. We believe it was clearly open to Congress to make a similar choice with respect to federal proceedings, and to avoid the unseemly spectacle of a trial by one district court of the validity of proceedings in another district court. (*supra*, p. 25), by substituting for habeas corpus a remedy of equivalent scope in the sentencing court.

There can be no doubt that even within the area to which the writ traditionally applies, Congress

has complete power to specify the court in which relief from a conviction can be obtained. This is clearly established by *Ahrens v. Clark*, 335 U. S. 188, in which this Court construed the habeas corpus statutes as confining jurisdiction to issue the writ for that purpose to the court within whose district the prisoner is held. Although there was strenuous dissent to a construction of the statute which, in the views of the minority, resulted in a "serious contraction of the availability of the writ" (335 U. S., at 194), no question was raised by any member of the court as to the power of Congress to impose such a jurisdictional limitation. See also *Whitney v. Dick*, 202 U. S. 132, construing the statutes as denying jurisdiction to circuit courts of appeals to issue writs of habeas corpus except in aid of an existing jurisdiction. If Congress can confine the issuance of the writ to a single court, we see no reason why it could not choose the sentencing court rather than the court of the district within which the prisoner is confined. *A fortiori*, in dealing with an area in which habeas corpus was not available at the time the Constitution was adopted, Congress had power to substitute for habeas corpus a remedy of equivalent scope in the sentencing court.<sup>51</sup>

<sup>51</sup> In other contexts, this Court has sustained legislation confining to a single tribunal the opportunity to assert constitutional issues. E. g., *Lockerty v. Phillips*, 319 U. S. 182, 186-8; *Yakus v. United States*, 321 U. S. 414, 443-8.

### C. CONGRESS CAN VALIDLY REQUIRE EXHAUSTION OF OTHER AVAILABLE REMEDIES AS A CONDITION TO THE RIGHT TO THE WRIT

As we have seen, Congress regarded the remedy by motion as an adequate substitute for relief by habeas corpus. In substituting that remedy, however, it took pains to preserve the right to apply for writ of habeas corpus in any case in which the motion procedure might prove "inadequate or ineffective." Thus, even if we are wrong in our belief that the motion will normally afford a completely adequate substitute, Congress has at most postponed resort to the writ. It is well settled that habeas corpus, as an extraordinary remedy, may be denied where other available remedies have not been exhausted. Thus, absent exceptional circumstances, it may not be used to anticipate an appeal. *Adams v. United States ex. rel. McCann*, 317 U. S. 269; cf. *Sunal v. Large*, 332 U. S. 174. "The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released." *Ex parte Simon*, 208 U. S. 144, 147. See also *Rodman v. Pothier*, 264 U. S. 399, 402. Even administrative remedies must be exhausted, since "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." Mr. Justice Holmes, in *United States v. Sing Tuck*, 194 U. S. 161, 168.

Accordingly, this Court recently held that to delay collateral attack on a military judgment until military procedures are exhausted is no suspension of the writ. *Gusik v. Schilder*, 340 U. S. 128, 131-132:

The policy underlying the rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. \* \* \*

Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

The requirement of exhaustion of other remedies is most clearly illustrated by the cases involving prisoners convicted by state courts. It is settled that, absent extraordinary circumstances, such prisoners must exhaust all state remedies (including appeal, habeas corpus, *coram nobis*, or writ of error) and petition for certiorari to this Court therefrom before they may petition for

habeas corpus in a federal court. *Ex parte Hawk*, 321 U. S. 114; *Darr v. Burford*, 339 U. S. 200. This judicially created postponement of the writ was given statutory sanction in 1948. 28 U. S. C. 2254; *Darr v. Burford*, *supra*. The rule has been consistently adhered to, even in cases in which the existence of an adequate state remedy was doubtful and the procedure for obtaining it uncertain. See *Marino v. Ragen*, 332 U. S. 561 (concurring opinion); *Young v. Ragen*, 337 U. S. 235. Its application has not infrequently resulted in several years' delay in affording a prisoner a determination of his contentions on the merits.<sup>32</sup> And, on occasion, it has resulted in a total denial

<sup>32</sup> See, for example, the case of Henry Hawk. Hawk was convicted in 1936. He filed an application for habeas corpus in the Nebraska court; its denial was affirmed by the Nebraska Supreme Court, *Hawk v. O'Grady*, 137 Nebr. 639, 290 N. W. 911 (1940), certiorari denied, 311 U. S. 645. Subsequent applications to the federal district court and to this Court were then denied for failure to exhaust state remedies, since they raised matters not previously brought to the attention of the state court. *Hawk v. Olson*, 130 F. 2d 910 (C. A. 8), certiorari denied, 317 U. S. 697; *Ex parte Hawk*, 318 U. S. 746; *Ex parte Hawk*, 321 U. S. 114. A second habeas corpus application to the Nebraska courts was dismissed (*Hawk v. Olson*, 145 Nebr. 306, 16 N. W. 2d 181 (1944), and this Court reversed, *Hawk v. Olson*, 326 U. S. 271. An application to the federal court was then denied on the ground that he had failed to apply for a proceeding *coram nobis* in the state courts. *Hawk v. Olson*, 66 F. Supp. 195 (D. Neb.), affirmed *sub nom. Hawk v. Jones*, 160 F. 2d 807 (C. A. 8). He then applied for relief *coram nobis* and his application was, for the first time heard on its merits and denied. *Hawk v. State*, 151 Nebr. 717, 39 N. W. 2d 561 (1949).

of relief because of the failure of the prisoner to take a procedural step which this court deemed necessary. *Darr v. Burford, supra*; cf. *Sunal v. Large*, 332 U. S. 174.

In the light of these cases, it is clearly not a suspension of the writ to require prior resort to a procedure whose availability is clear, which there is every reason to believe will prove adequate; and which should be pursued with expedition, as the statute requires (see p. 58, *supra*).

**D. CONGRESS CAN VALIDLY PROVIDE THAT A COURT IS NOT REQUIRED TO ENTERTAIN A SECOND MOTION.**

Both Judge Denman (R. 46) and Judge Stephens (R. 38-9) rested their decision that Section 2255 was unconstitutional at least in part on the view that a denial of a motion under that section was necessarily *res judicata*. It is clear that such a denial does preclude relief by habeas corpus, unless the court finds that the motion remedy was inadequate or ineffective. But it is equally clear that, in the discretion of the court, a second motion under Section 2255 may be entertained.<sup>53</sup>

Section 2255 provides, in language identical with that of Section 2244 relating to habeas corpus applications, that the court "shall not be required to entertain" a second motion for simi-

<sup>53</sup> Judge Denman's contrary view (R. 46) appears to have been based on his understanding as to the effect of a denial of a writ of error *coram nobis*. The question, however, is not what the practice was in *coram nobis*, but what the present statute says it is to be on a motion.

lar relief on behalf of the same person.<sup>54</sup> It thus makes applicable to motions under Section 2255 the principle of *Salinger v. Loisel*, 262 U. S. 224, that the question whether to entertain a second habeas corpus application rests in the discretion of the court. Cf. *Price v. Johnston*, 334 U. S. 266, 289. As on habeas corpus, the prisoner may, in the discretion of the court, be allowed two or more bites at the cherry. Accordingly, there is no occasion to consider whether Congress could provide that a judgment on a habeas corpus petition or a motion to vacate is, like other judgments, *res judicata* as to all matters that were or could have been presented.

In 1789 one convicted of crime in a federal court had no right of appeal.<sup>55</sup> He had no opportunity to attack his conviction on habeas corpus. Protection of his constitutional rights was thus left to a single trial judge. Today he has the rights of appeal to a court of appeals and petition for certiorari to this Court from his conviction; the right at any time to file a motion in the sen-

<sup>54</sup> The Judicial Conference was acutely aware of the difference in effect between "shall not be required to entertain" and "shall not entertain." See note 11, p. 24, *supra*.

<sup>55</sup> See *Ex parte Kearney*, 7 Wheat. 39, 42; *Ex parte Gordon*, 1 Black 503, 504-505. Appellate review in federal criminal cases was first authorized by the Act of March 3, 1879, 20 Stat. 354. See also the Act of February 6, 1889, 25 Stat. 655, 656; *Stephan v. United States*, 319 U. S. 423.

tencing court under Section 2255, with appeal to a court of appeals and certiorari to this Court; the privilege of additional applications to the sentencing court which that court may in its discretion entertain; and the right to petition for habeas corpus if the proceeding ~~is~~ motion in the sentencing court is inadequate or ineffective. It is difficult to see how this great enlargement in available remedies can be said to be a suspension of the narrow constitutional right of habeas corpus created in 1789.

#### CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed with directions to remand the cause to the District Court for a hearing on the merits of the motion with respondent present.

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OCTOBER 1951.

## APPENDICES

### I. JUDICIAL CONFERENCE DOCUMENTS

#### A. REPORT OF THE HABEAS CORPUS COMMITTEE, SUBMITTED AT THE 1943 SESSION OF THE CONFERENCE

*To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:*

Your Committee appointed to study the subject of procedure on habeas corpus in the federal courts has given careful study to the subject, aided by officials of the Administrative Office and the Department of Justice. Mr. Will Shafroth of the Administrative Office acted as Secretary of the Committee and made a statistical study of habeas corpus proceedings in the federal courts during the fiscal year 1942. Mr. Alexander Holtzoff of the Department of Justice filed with the Committee a statement as to administrative problems in habeas corpus proceedings, sat with the Committee in the hearings and assisted in the drafting of the legislation proposed. Attached to this report are the statement of Mr. Holtzoff and the statistical tables prepared by Mr. Shafroth.

The Committee met in Washington, D. C., on May 8, 1943, and remained in session for four days during which problems relating to procedure under habeas corpus were fully discussed. It was the opinion of the Committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with

deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the Committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Johnson v. Zerbst*, 304 U. S. 458; *Rowen v. Johnston*, 306 U. S. 19, 24; *Watley v.*

*Johnston*, 316 U. S. 101, 104. As said in the case last cited:

The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Bowen v. Johnston*, 306 U. S. 19, 24.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of the prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith v. O'Grady*, 312 U. S. 329; *Cochran v. Kansas*, 316 U. S. 255; *Pyle v. Kansas*, — U. S. —, 63 S. Ct. 177; *Sharpe v. Buchanan*, — U. S. —, 63 S. Ct. 245; *People v. Wilson*, — U. S. —, 63 S. Ct. 840. And when state remedies have been exhausted, there is doubt whether a habeas corpus proceeding can now be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist." See cases last cited. It has been held that habeas corpus will lie where there is allega-

tion that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and that his remedies under state law have been exhausted. See *Mitchell v. Youell*, 4 Cir. 130 F. 2d 880; *Carey v. Brady*, 4 Cir. 125 F. 2d 253; *Gall v. Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker v. Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell v. Youell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved

in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half a dozen or more judges; and each is bound to give it consideration without any regard to the principle of res adjudicata.

To remedy the evils in the present practice arising out of petitions for habeas corpus by prisoners convicted of crime in the state or fed-

eral courts, your Committee has drafted two proposed statutes copies of which are hereto attached. The purpose of the first, marked "A," is to limit, except in rare cases, the right to apply for habeas corpus on the part of persons imprisoned under a conviction of crime in the state or federal courts and to substitute another remedy by motion in the nature of writ of error coram nobis to test the constitutional validity of the judgments under which they are imprisoned. The second, marked "B", has for its purpose the prescribing of a procedure which will obviate the abuses and inconveniences of the present procedure, in cases where resort to habeas corpus may be appropriate.

*Comments on Statute "A", prescribing new remedy and limiting jurisdiction in habeas corpus*

SEC. 1. All of the members of the Committee, except Judge Underwood, are agreed on the first section of the statute as recommended. Judge Underwood agrees that the object of the section is desirable but does not approve of the machinery devised to attain it. It will be observed that the first section applies only to the case of prisoners in custody under judgments of state courts.

The effect of the section is to require that questions as to the constitutional validity of judgments of state courts be tried in those courts. For this purpose, the statute prescribes that after the making of a motion, in the nature of application for writ of error coram nobis, in the state court, application for certiorari may be made to the Supreme Court of the United States,

and that court is given power to review by certiorari the proceedings of the state court. The certiorari will bring before the Supreme Court, not only the record made on the motion, but also the judgment of conviction under which petitioner is imprisoned. The power of Congress to prescribe a remedy in the state courts, by which the deprivation of rights under the Constitution of the United States may be inquired into and record made for review by the Supreme Court of the United States, is not thought by the majority of the Committee to be subject to doubt. The proposed statute denies to federal Circuit and District Judges the power to issue writs of habeas corpus in such cases "unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the procedure prescribed."

SEC. 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday v. Johnston*, 313 U. S. 342, 349. All members of the Committee agree on this part of the section. The last sentence of the section denies to any federal Circuit or District Judge power to release under habeas corpus a prisoner authorized to apply for relief by motion under the section, unless it shall appear that

it is not practicable for his rights to be determined on such motion. Judges Stephens, Underwood and Wyanski do not agree to this sentence; and the second section of the act is accordingly presented in the alternative. It will be observed that alternative section 2 omits the last sentence contained in section 1.

*Comments on Statute "B", procedural provisions*

SEC. 1. Section one is presented in the alternative. The form favored by the majority of the Committee makes it discretionary with a Circuit or District Judge whether or not he shall entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it shall appear that the legality of such detention has been determined in a prior application for habeas corpus and no new ground is presented in the present application. Judge Stone and the Chairman are of the opinion that alternative Section 1 should be adopted, the effect of which would be to limit petitioners to one application, unless a new ground is presented.

SEC. 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SEC. 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SEC. 4: The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SEC. 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECS. 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

#### *Recommendation to District Courts*

The Committee was impressed by a suggestion of Judge Underwood that much could be done to avoid the evils arising from application for habeas corpus by prisoners under sentence of federal courts, if greater care were exercised by trial courts in properly making of record matters as to which such applications ordinarily relate. That suggestion is as follows:

It would seem that much could be accomplished in this way by a more careful preparation of the trial court records, in view of the rulings of the Supreme Court in the case of *Riddle v. Dyche*, 262 U. S. 333, and the more recent case of *Cochran v. Kansas*, 316 U. S. 255, in which the Court says, "We accept the court's conclusion that the record, showing that Cochran was represented by counsel throughout, and revealing on its face no irregularities in the trial, is sufficient refutation of his

unsupported charge that he was denied the right to summon witnesses and testify for himself." I think it would greatly reduce the number of cases, or at least put them in such shape as to make it possible to dispose of them without great consumption of time, if the trial court, where the defendant is not represented by counsel, would not only carefully advise him of his constitutional rights, especially that of assistance of counsel, but also, where a plea of guilty is entered, require the plea to be in writing, to be intelligently signed by the defendant and to expressly recite that he has been so advised and tendered counsel and has waived same, in addition to including in the sentence, which is now usually done, a statement of such facts. It is the practice in this Court not only to have the defendant sign the plea but also his attorney, when there is one, to establish the fact of his presence, and also to have the sentence include a recitation of his presence; and to include an express waiver of counsel in writing if there is no counsel. If this were done, many of the cases could be disposed of upon the record and the petitioner sent to the trial court for the correction of the record if he contends that same is incorrect.

JUNE 7, 1943.

Respectfully submitted.

JOHN J. PARKER, *Chairman.*  
KIMBROUGH STONE.  
ALBERT LEE STEPHENS.  
E. MARVIN UNDERWOOD.  
EDGAR S. VAUGHT.  
CHARLES E. WYZANSKI, Jr.

## STATUTE "A"

A BILL To regulate the review of judgments of conviction  
in certain criminal cases

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if a prisoner in custody pursuant to a judgment of conviction of a court of any State, claiming that the judgment is void because in violation of the Constitution or laws of the United States, after exhausting all remedies in the courts of the State, moves in said court to vacate and set aside the judgment and either to discharge him or to resentence him, or to grant a new trial, and if the court denies the motion, or fails or refuses to act thereon within sixty days after it is presented, the prisoner after exhausting whatever rights of review may be accorded by the laws of the State, may apply within three months thereafter to the Supreme Court of the United States for a writ of certiorari. It shall be competent for the Supreme Court by writ of certiorari to require that the cause be certified to it for review and determination. In that event the Supreme Court shall have jurisdiction to review the proceedings had on the motion as well as the judgment of conviction for the purpose of determining the claim that the judgment is void because in violation of the Constitution or laws of the United States. No circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to*

a judgment of conviction of a court of any State, unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the proceedings hereinabove prescribed.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it is not practicable to determine his rights on such motion because of the necessity of his presence at the hearing, or for other reason.

Judge A. L. Stephens, Judge Underwood, and

Judge Wyzanski favor the following substitute for Sec. 2:

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals.

#### STATUTE "B"

**A BILL** To regulate habeas corpus proceedings in the courts of the United States

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any*

State, if it appears that the legality of such detention has been determined by any judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent judicial decision or the enactment or repeal of a statute.

SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a prisoner pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the

extent that the Judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Judge Parker and Judge Kimbrough Stone favor the following substitute for Sec. 1:

That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment

or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time.

[Statistical tables and memorandum of Mr. (now judge) Holtzoff omitted in printing.]

B. SUPPLEMENTAL REPORT

SEPTEMBER 28, 1943.

*To the Chief Justice of the United States and  
Members of the Conference of Senior Circuit  
Judges:*

Your Committee to study the subject of procedure on habeas corpus in the federal courts, after receiving letters from various judges throughout the United States, held a meeting in Washington on Monday, September 27, considered same, and begs leave to submit the following supplemental report.

1. The Committee recommends as a substitute for Statute A, Section 1, the following:

No Circuit or District Judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States,

who has no adequate remedy in a state court by habeas corpus, writ of error ~~ceram nobis~~ or otherwise files a petition for writ of habeas corpus before any Circuit or District Judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue same and shall call to his assistance two other judges so chosen that at least one of the three shall be a Circuit Judge or a Circuit Justice, who shall constitute a special court for the hearing of such petition. Appeal shall lie from such court directly to the Supreme Court of the United States. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing same, he shall dismiss the petition, to which action an appeal shall lie to the Circuit Court of Appeals for the Circuit. The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances of peculiar urgency.

2. Lines 26-27 of Statute A, Section 2, for the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 34. For the words "is void because," substitute the words "has been obtained."

Line 46. For the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 54. For the words "is void because", substitute the words "has been obtained."

3. Statute B, Section 1. Line 6. After the word "judge" insert the words "or court."

4. Your Committee considered a suggestion to the effect that a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect.

5. Your Committee suggested that section 832 of Title 28 U. S. C. be amended to permit an alien as well as a citizen to prosecute a habeas corpus proceeding in *forma pauperis*.

JOHN J. PARKER,  
*Chairman, for the Committee.*

C. LETTER AND MEMORANDUM FROM MR. CHANDLER  
TO THE ~~President~~ OF THE HOUSE.  
~~Committee~~

[Identical letter and memorandum was sent to the ~~President~~ of the Senate ~~Committee~~.]

MARCH 2, 1944.

DEAR MR. SPEAKER: In behalf of the Judicial Conference of Senior Circuit Judges I herewith submit for the consideration of the House of Representatives two bills with regard to habeas corpus procedure. These bills were approved by the Judicial Conference of Senior Circuit Judges at its annual meeting, held September 28 to October 1, 1943, upon the recommendation of a committee of the Conference, consisting of United States Circuit Judges John J. Parker, senior circuit judge of the Fourth Circuit, chairman, Albert Lee Stephens, of the Ninth Circuit, and Kimbrough Stone, senior circuit judge of the Eighth Circuit, and United States District Judges

E. Marvin Underwood, of the Northern District of Georgia, Edgar S. Vaught, of the Western District of Oklahoma, and Charles E. Wyzanski, Jr., of the District of Massachusetts: I respectfully request that these bills be introduced and hope that they may be enacted.

One of the two bills puts certain limitations on the jurisdiction of the federal courts to issue a writ of habeas corpus, testing the legality of the detention of persons held by reason of conviction of a crime by either a federal or state court; the other bill regulates the procedure in the federal courts on application for a writ for the purpose above mentioned and among other things makes applicable to habeas corpus proceedings the doctrine of res judicata.

The bill relating to jurisdiction and the first two sections of the bill relating to procedure, deal only with applications for habeas corpus by a prisoner who has been convicted in a state or federal court and who urges his conviction was secured in violation of his constitutional rights. These cases are now creating difficulties for the courts which in the opinion of the committee should be remedied. Under the present law a defendant who has been imprisoned under the judgment of a state trial court, even though that judgment has been affirmed by the highest court of the state, may then come into a United States district court and, on the ground that constitutional rights have been denied him on the trial, ask a review of the validity of the state court judgment. Frequently the review requested will be with respect to matters which have been fully considered in the state courts. The danger in

volved in a procedure which leads to such a conflict between the state and federal jurisdictions is apparent.

A second evil of the present system occurs by reason of the fact that the violation of the constitutional rights of the defendant is often alleged to have occurred with respect to matters outside the records, such, for example, as whether or not the defendant was given an opportunity to have counsel. Where the defendant is under conviction of a federal court, as well as where he has been convicted in a state court, the application for habeas corpus is usually made in a court other than that in which the trial took place. Under the present practice no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if he is heard at all in respect to the matter, he must be heard as an ordinary witness. Sometimes clerks of court and United States attorneys have been compelled to travel considerable distances to testify in such cases and on at least one occasion the trial judge of a state court appeared as a witness in a habeas corpus proceeding in a federal court and testified in defense of the proceedings had in his court.

While the practice of having criminal proceedings in one federal district court reviewed and their validity determined in habeas corpus proceedings by another district court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of the Judicial Conference that the question as to the constitutional validity of the

trial should be raised in the trial court where this is feasible.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made and the time of federal judges is needlessly consumed in hearing repeated applications involving identical contentions. The Supreme Court has specifically stated that the principle of *res judicata* does not apply to a decision on habeas corpus refusing to discharge a prisoner (*Waley v. Johnston*, 316 U. S. 101, 105). Notwithstanding the denial of one application for a writ of habeas corpus, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Sometimes each of a half dozen judges is asked in turn to pass on the same application and each is bound to give it consideration without any regard to the principle of *res judicata*.

To remedy these defects in the present law, the committee has proposed, and the Conference has recommended, the bills above referred to. The first section of the jurisdictional bill would prevent a federal court from receiving a habeas corpus petition from a prisoner convicted in a state court unless it appeared that there is no state corrective process by which the prisoner can have his contention passed on, or special circumstances make such process unavailable to protect his rights. If these conditions are met, then the federal judge would be authorized to

request the senior circuit judge to call a three-judge court to hear the application.

Section two of the jurisdictional bill refers to prisoners in custody pursuant to a conviction of a United States court and provides that in such a case the remedy of the prisoner is to apply by motion to the trial court to set aside the judgment. Only when it is not practicable for the prisoner to have his right to release from custody presented on motion to the trial court because of his inability to be present at the hearing or for other reasons,—only then can he apply to any other federal judge for habeas corpus.

The procedural bill establishes the doctrine of res judicata, where the legality of the prisoner's contention has already been determined by a federal judge and no new ground is presented. However, the judge who originally passes on the application for a writ may grant a rehearing at any time. Other provisions of the bill allow the certificate of the trial judge as to the facts occurring at the trial to be filed in lieu of requiring him to testify in the habeas corpus proceedings; allow testimony to be taken by affidavit at the discretion of the judge; make admissible evidence taken on prior habeas corpus applications; and specify several procedural details in connection with the proceedings.

An attached memorandum gives some further information in reference to the present state of the law and the provisions of the bills. The Judicial Conference is of the opinion that the present law in reference to habeas corpus is de-

fective and the enactment of the attached bills is urged to cure its defects.

Yours very respectfully,

(S) HENRY P. CHANDLER.

HONORABLE SAM RAYBURN,

*Speaker of the House,*

*Washington, D. C.*

MEMORANDUM WITH REFERENCE TO HABEAS CORPUS  
BILLS, RECOMMENDED BY THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES

Present procedure in habeas corpus in the United States courts, as governed by the statutes of the United States, is clearly and succinctly set forth in the following quotation from the opinion of Justice Roberts in the case of *Walker v. Johnston*, 312 U. S. 275, at pages 283 and 284:

The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of habeas corpus; that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known. The court or justice or judge "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." The writ shall be directed to the person in whose custody the petitioner is detained. The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the

party before the judge who granted the writ. When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time. The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath. The court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitioners are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial,

and if issues of fact emerging from the pleadings are tried as required by the statute.

This procedure was adequate as long as the court hearing the application was held bound by the record made on the trial of a prisoner previously convicted in either a state or federal court, not only with respect to questions raised on the trial but also with respect to questions which might have been raised, so that matters outside the record could be considered only to a very limited extent as affecting the validity of the trial. Decisions of the Supreme Court in recent years, however, have greatly enlarged the scope of the inquiry in habeas corpus proceedings by holding that this remedy is available to test the validity of the judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated with reference to matters outside the record. For example, the court has held in *Johnson v. Zerbst* (304 U. S. 458), that the denial by the trial court to a defendant of his constitutional right to be represented by counsel invalidates the judgment and entitles him to release on habeas corpus. Because of the possibilities which have been created of conflicts between state and federal courts and between federal courts of coordinate jurisdiction, the present condition is unsatisfactory. The purpose of the proposed legislation is to remedy this situation.

Section one of the first bill, referred to in the attached report of the Conference committee as Statute A, relates to applications for writs of habeas corpus by prisoners who have been convicted

in a state court. It provides that such applications can be heard by a federal court only where it appears that the petitioner has no adequate remedy in the courts of the state, and the phrase "no adequate remedy" is further defined as meaning "absence of state corrective processes or evidence of exceptional circumstances rendering such process unavailable to protect his rights." For example, where the writ of habeas corpus is not available in the state court for the purpose of protecting constitutional rights, or where, though it is available, the local prejudice is so strong as to prevent fair and adequate consideration of the questions raised, then the petitioner is entitled to file his application for a writ in the federal court on the basis that the judgment of the trial court was obtained in violation of the constitution and laws of the United States. It then becomes the duty of the judge to determine whether there is reasonable ground for the issuance of the writ. If he concludes there is, he then is required to request the senior circuit judge of the circuit in which the court is located to call together a three-judge court for the purpose of hearing and determining the application. This process is similar to that which exists for the purpose of hearing requests for injunctions suspending or restraining the enforcement or operation of any act of Congress on the ground that it is unconstitutional. The decision of the three-judge court is reviewable by the Supreme Court of the United States by writ of certiorari. If, however, the judge to whom the application is made determines that it is groundless, he may dismiss the petition and an

appeal from that decision lies to the circuit court of appeals.

Section two of the jurisdictional bill refers to prisoners who have been convicted in a federal court, and requires them, instead of making application for habeas corpus in the district in which they are confined, to apply by motion to the trial court to vacate or set aside the judgment. That court is then required to grant a prompt hearing and render its decision on the motion, from which an appeal lies to the circuit court of appeals. If it appears that it is not practicable for the prisoner to have his motion determined in the trial court because of his inability to be present at the hearing, "or for other reasons," then he has the right to make application to the court in the district where he is confined. Such an instance might occur where a dangerous prisoner, who had been convicted in the Southern District of New York, was confined in Alcatraz Penitentiary. The bill expressly provides that no circuit or district judge of the United States shall entertain an application for a writ in behalf of any prisoner unless it appears that his right to discharge cannot be determined by motion made in the trial court.

The bill relating to procedure in habeas corpus proceedings is designed to prevent the presently existing practice of "shopping around" by petitioners in the attempt to take every possible step presently available to secure their release. Sections one and two apply only to applications for a writ by prisoners who are held pursuant to the judgment of a court of the United States.

or of a state. Section one provides that, when an application for a writ has once been passed on by a federal judge, that judgment shall be res judicata, unless a new ground is presented, and no circuit or district judge shall be permitted to entertain an application based on the same grounds as the one previously presented. The bill defines a new ground as including a subsequent decision of an appellate court or a change in law. It is further provided that the judge who determines the application in the first instance may grant a rehearing at any time.

Section two makes admissible in evidence, on the hearing of a habeas corpus application, the certificate of the trial judge setting forth the facts concerning the trial. Its purpose is to obviate taking the deposition of the judge or calling him as a witness.

Section three further facilitates the production of evidence at the habeas corpus hearing by providing that it may be taken by deposition or, at the discretion of the judge, by affidavit.

Section four makes admissible proceedings and evidence in behalf of the same petitioner taken at previous hearings of a similar application.

The remaining sections of the bill deal with procedural requirements on applications for habeas corpus writs.

The report of the Committee on Habeas Corpus to the Judicial Conference is attached to this memorandum in order to provide fuller information concerning the situation and the changes which are needed. Some substantial changes in the jurisdictional bill recommended in the report were made by the committee just prior to the

Conference and, after full consideration, the Conference approved both bills as they appear in the attached copies.

**A BILL** To regulate the review of judgments of conviction in certain criminal cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a state court by habeas corpus, writ of error coram nobis or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended, (28 USC 380a), who shall constitute a special court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United*

States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the Circuit Court of Appeals for the Circuit, upon the filing of the certificate required by the Act of March 10, 1908, C. 76, entitled An Act Restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended (35 Stat. 40, 28 USC 466). The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances rendering such process unavailable to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was

in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the Circuit Court of Appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia. (Referred to in Committee Report as Statute A.)

**A BILL To regulate habeas corpus proceedings in the courts of the United States.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any state, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.*

**SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any state, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certifi-**

cate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting

the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending. (Referred to in Committee Report as Statute B.)

D. MEMORANDUM SUBMITTED BY CIRCUIT JUDGE STONE AT THE 1946 SESSION OF THE CONFERENCE

*Habeas Corpus Bills*

While the members of the Conference are familiar with the more important happenings in connection with the habeas corpus bills occurring since the last meeting of the Conference, it seems proper that I should report to the Conference a somewhat more detailed statement.

At the 1945 Conference, Chief Justice Stone urged that something should be done in connection with the introduction and progress of the Bills which had been approved by the Conference in 1944. As Judge Parker (Chairman of the Conference Committee) was in Europe, the result was that I was directed by the Conference to give attention to the matter.

Before leaving Washington after that meeting, I talked with Senator McCarran and Mr. Sumners and as a result, Mr. Sumners introduced the two Bills (H. R. 4232, 4233) on October 1, 1945, and Senator McCarran introduced them (S. 1451, 1452) on October 3. In these talks with Senator McCarran and Mr. Sumners, each requested that I prepare and forward a Statement

of the purposes of the Bills for the use of their several Committees.

Realizing that a Statement of that character to the members of Congress would, because of their general unfamiliarity with the problem, require something quite different from a statement to the Judges, I prepared what I hoped would be informative and useful, to the Committees. This Statement was sent to Chief Justice Stone who suggested some changes therein. After meeting his approval, the Statement was sent to Senator McCarran and to Mr. Sumners. Here I wish to express my personal appreciation of the great assistance given me by Mr. Chandler, Mr. Whitemurst, and Mr. Shafrroth in the assembly of material used therein. A copy of the Statement is attached hereto.

Late in March, Mr. Chandler ascertained that the Senate Committee had requested the Department of Justice to examine the Bills and state its reaction thereto and also that the Department had several serious objections to the jurisdictional Bills (S. 1451, H. R. 4233). The Department had no objection to the procedural Bills (S. 1452, H. R. 4232). Mr. Chandler took up this situation with Chief Justice Stone and it was determined to request from the Department a copy of its objections before the same had been cleared with the Bureau of the Budget and sent to the Senate Committee—the purpose being to see whether these objections might be obviated and opposition to the Bills from the Department avoided. The Department was entirely cooperative and, somewhat later, furnished Mr. Chandler with a copy of its objections. In consulta-

tion with Chief Justice Stone and Mr. Chandler, it was thought advisable for me to come to Washington and take up this matter with the representatives of the Department in the hope that the serious drawback of an adverse position by the Department might be prevented.

The early part of April, this year, I came on to Washington. I had several extended consultations with Mr. Bergson and Mr. Baynton of the Department regarding this matter. The result was that we finally reached entire agreement in principle. Mr. Bergson suggested the advisability of drafting a new jurisdictional Bill to be substituted for S. 1451 and H. R. 4233 instead of stating amendments which were thought to be proper to those Bills. During all of these proceedings, I kept Chief Justice Stone thoroughly informed and he made several suggestions, all of which were incorporated. Mr. Bergson and Mr. Baynton and myself drafted a substitute Bill which was approved by them and also by Chief Justice Stone who stated to me that he regarded it as better than the pending jurisdictional Bills. Chief Justice Stone and I thought this draft should be submitted to the members of the Judicial Conference before being presented to Senator McCarran and Mr. Sumners. However, with the approval of Chief Justice Stone, I told Senator McCarran and Mr. Sumners of the situation and that a draft had been made and would be submitted to them for their consideration if approved by the members of the Conference.

This draft was sent out promptly to the members of the Conference with an explanatory letter. All of the members of the Conference responded

except Judge Evans who, his secretary wrote me, was too ill to consider the matter. Some of the replies were a bit delayed so that all of the members had not been heard from until early in June. All approved except Judge Evans who was unable to respond. On June 7, this draft was sent to Senator McCarran and to Mr. Sumners with a request that it be considered as a substitute (agreed to by the members of the Conference and the Department of Justice) for the pending jurisdictional Bills. Mr. Sumners introduced this draft on June 10 (H. R. 6723).

The original House Bills and H. R. 6723 were referred to the House Judiciary Sub-committee Number 2, of which Mr. Weaver of North Carolina is Chairman. No action has been taken upon those Bills by the Sub-committee.

The Senate Judiciary Committee has considered the original Bills.

A related matter, to which I should call the attention of the members of the Conference, is that the Committee of the House on Revision of the Law, of which Mr. Keogh is Chairman, has been considering the matter of revising and codifying the "Judicial Code and Judiciary" and has prepared a draft of a Bill. Included therein is "CHAPTER 153.—HABEAS CORPUS." The Draft of this CHAPTER 153 covers the essential parts of the existing statutes governing habeas corpus and incorporates therein certain provisions contained in the above Bills now in Congress. In so far as matters not contained in existing statutes are included in this draft, those having to do with the jurisdictional Bills are in Sections 2254 and 2255. While similar in some respects, the pro-

visions in these two sections differ from all of the three jurisdictional Bills approved by the Conference.

Chief Justice Stone was fearful that any action taken by Mr. Keogh's Committee on the subject of habeas corpus in the fields covered by the Conference Bills might cause confusion and harm. On March 25, 1946, he wrote to Mr. Keogh a letter, the closing paragraph of which is as follows:

I also call your attention to the fact that a committee of the Conference of Senior Circuit Judges, of which Judge Parker is chairman, and Judges Kimbrough Stone, Albert Lee Stephens, Underwood, Vaught and Wyzanski are members, was appointed some years ago to prepare a bill governing the use of habeas corpus in the federal courts. After considerable study of the subject the committee has prepared two bills which have been introduced in Congress. They are S. 1451 and S. 1452; H. R. 4232 and H. R. 4233. As these bills depart rather extensively from the provisions in the proposed revision, and as they will probably have the backing of the Judicial Conference, your committee may find it desirable to seek some way of avoiding having two committees of Congress working at cross-purposes in this field.

On April 29 I wrote to Mr. W. W. Barron as follows:

I have your letter of April 25 with enclosed copy of your letter of that date to Judge Sanborn and your suggested redraft of Section 2255 in revision of Title 28.

Two weeks ago I went to Washington, at the call of the Chief Justice, to attempt

to iron out some objections which the Department of Justice had raised to the jurisdictional Bill in regard to habeas corpus which had been approved by the Judicial Conference and introduced into the Senate and the House (S. 1451, H. R. 4233). After several conferences with representatives of the Department, we reached entire agreement, not only as to principle but as to the wording of a new draft to be introduced and to be a substitute for the present Bills. This draft was approved by the Chief Justice who thought it stronger than the present Bills. It is now under submission to the members of the Judicial Conference and, in so far as I have received replies, has been unreservedly approved. I think the draft will meet the approval of the Conference and it will then be introduced. Thereafter, hearings will be held by the Subcommittee and it is hoped that some action by Congress may result in the reasonably near future.

Chief Justice Stone was very much interested in this legislation. Also, he was quite apprehensive that there be no action by the Committee on Revision which would create any cross currents affecting this proposed legislation. If the Bills approved by the Conference should pass, I assume that would take care of the Revision in so far as the territory covered by those Bills is concerned.

My suggestion is that care be taken that no action of your Committee should confuse the present movement toward improvement in the features of habeas corpus covered by the Conference Bills.

These differences in the draft by Mr. Keogh's Committee and the drafts of jurisdictional Bills

approved by the Conference have created a situation which will require adjustment.

Since I understand that Judge Parker (who was Chairman of the Committee of the Conference which considered this matter) will shortly return, I suggest that it would be proper for the Conference to relieve me of further duties in this connection.

KIMBROUGH STONE.

SENATE BILLS Nos. 1451 AND 1452

*Statement as to Necessity for and Purposes of the Bills*

Generally speaking, the modern conception of *habeas corpus* is as a remedy to test the legality of the detention in custody of one person by another.<sup>1</sup> In United States Courts, the scope of the remedy is defined by statute<sup>2</sup> and has to do with confinements which are unlawful under the Constitution, treaties or laws of the Nation.

This scope (under present statutes) is very extensive and includes innumerable situations. Our concern here is with but *one* of these situations.

<sup>1</sup> Chief Justice Stone, in *McNally v. Hill, Warden*, 293 U. S. 131, 136 (Nov., 1934), stated:

"Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of *habeas corpus ad subjiciendum*, by which the legality of the detention of one in the custody of another could be tested judicially."

<sup>2</sup> In 1807, the Supreme Court, by Chief Justice Marshall, stated: "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch \*75, \*94.

That is where the confinement is solely under the sentence of a court (Federal or State) imposed in a criminal case upon a plea of guilty or upon a conviction on trial.\*

It will be helpful to the Committee to have a statement (I) of the necessity for, and (II) of the purposes of the suggested legislation embodied in these two related Bills. This statement is addressed both to the Senate and to the House of Representatives Committees because identical Bills are pending in each of the two Houses.

#### I. THE NECESSITY

The necessity for legislation is the prevention of present burdensome abuses of the remedy of habeas corpus. The Congress has already enacted legislation to curb the abuse of Appeals in habeas corpus cases.\* The present abuses have

None of the large number of other situations is intended to be at all affected by these Bills. Among such other situations, frequently recurring, are: confinements connected with foreign extradition, extradition from one State to another, removal from one Federal District to another, deportation, violation of immigration Acts (general and Chinese), trial before military or naval tribunals, commitments under sentence of military or naval tribunals, contempt proceedings, commitment in contempt proceedings, and holding for trial in Federal or in State courts.

\* No Appeal to the Supreme Court (Act of Feb. 13, 1925, 43 Stat. 936, 942, § 13; 28 U. S. C. A. § 347 (c)) where detention is under process issued out of a State court, no appeal allowed to Circuit Court of Appeals unless there is a certificate of "probable cause for such allowance" by trial judge or by a Circuit Judge (Act of Feb. 13, 1925; 43 Stat. 936, 940, § 6 (d); 28 U. S. C. A. §§ 463 and 466); no appeal allowed where detention is in removal proceedings (Act of June 29, 1938; 52 Stat. 1232; 28 U. S. C. A. § 463 (pocket parts p. 87)).

to do with *original* petitions in the Supreme Court, the District Courts and before Justices of the Supreme Court, Circuit and District Judges.

Under existing law, the Supreme Court and the District Courts have power to issue the writ (28 U. S. C. A. § 451); also, the individual Justices of the Supreme Court and all Circuit and District Judges, within their respective jurisdictions, have like power (28 U. S. C. A. § 452). Since there is no statutory limitation to the number of successive petitions which may be filed by the same person and since *res judicata* does not apply in habeas corpus proceedings (*Waley v. Johnston*, 316 U. S. 101, 105 (1942)); the same prisoner may file successive petitions, innumerable times, in the Supreme Court, in the proper District Court, before each of the Justices of the Supreme Court, before each of the Circuit Judges of the Circuit within which he is confined, and before each of the District Judges (if there be more than one) in the District where confined. He may file such petitions before the same Court or Justice or Judge as many times as he wishes or he may "shop around" from Court to Court and from Justice to Justice and from Judge to Judge.

Since release is sought from commitment after sentence under a criminal charge, the grounds stated in any of these petitions are necessarily confined to alleged unlawful actions in connection with the indictment, the trial, the sentence or the manner or place of executing the sentence under which petitioner is confined. Since these grounds usually have to do with past happenings, it is

very rare that a petitioner does not state, or does not have the knowledge from which he could state, in his *first* petition all of the grounds he may ever have. The result of this is that the same petition, in substance, may be and is filed again and again before the same or different Courts, Justices or Judges.

All of this creates a strange and anomalous situation as follows:

(1) A man is indicted, pleads guilty and is sentenced; or he is tried and convicted and sentenced. Throughout that entire proceeding—up to pronouncement of sentence—he may present any reasons (of law or fact) to meet the charge against him. Throughout this entire proceeding, up to sentence, he is protected by the presumption of innocence; and he must be proven guilty either by his own plea or by evidence which shows guilty beyond a reasonable doubt. After conviction, he has a right to appeal to a Circuit Court of Appeals to test the fairness of his trial, with a further right to apply to the Supreme Court for certiorari from an unfavorable decision in the Court of Appeals. The sole purpose of this appellate procedure is to insure that, before he is punished, he shall have one fair trial but he is allowed *only one* fair trial before punishment.

(2) After he has tested, or had the opportunity to test, the fairness of his conviction as above he goes to prison. His presumption of innocence has been overcome by guilty plea or conviction on trial and he is then presumed to be guilty and to have had a fair trial. Nevertheless, he can then file a petition for habeas corpus to test the validity of that very conviction. Out of a solici-

tude to protect the liberty of even a confessed or convicted person, it is entirely proper to allow him this further test of the proceedings resulting in his confinement. The strange anomaly is that, while he (presumably innocent) can have but one fair trial for the crime, he can, after conviction (then presumably guilty) have as many habeas corpus proceedings as he may desire with again the same rights of appeal (except where under State sentence) and of certiorari in each such proceeding as he had when tried for the crime. Also, that each of these habeas corpus proceedings may be based on the same grounds.

Anomalous and unnecessary as this right to file repeated petitions in habeas corpus seems, the attention of The Congress would not now be drawn to it except for a situation which has arisen and developed in the last few years.<sup>6</sup> This situation has resulted in a flood of habeas corpus petitions—a substantial number being repetitions—which has seriously interfered with the other work of various busy courts and judges.<sup>7</sup>

<sup>6</sup> Earlier abuses of the writ have not been lacking (see *Storti v. Massachusetts*, 183 U. S. 138, 141 (1901), but the extent of abuse has never approached the present proportions.

<sup>7</sup> The attached Tables I and II are informative as to the extent and increase of recent filings of habeas-corpus petitions; as to repetitious filings by the same petitioners; and as to the increase of groundless petitions. Table I covers these matters in the Supreme Court and Table II in the District Courts.

These Tables do not include the District of Columbia, as to which see *Dorsey v. Gill* (Feb. 1945), 148 F. 2d 857, 862, footnote 7. As to repetitious filings in the District of Columbia, the *Dorsey* opinion, at page 862, states: "Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also

Experience has demonstrated the utter futility of nearly all of these recent petitions, as well as the insincerity of many of them. This is true even where the prisoner has filed but one petition. The instances in which discharge has occurred on a subsequent petition are practically nil.

The situation causing this serious influx of habeas corpus cases in recent years arose as follows. For more than one hundred years, the decisions of the Supreme Court have many times stated the general rule that, in United States Courts, habeas corpus cannot perform the function—directly or indirectly—of a writ of error or an appeal. The division line has been and is between error (correctable by writ of error or appeal) and violations of constitutional right which do not appear of record and thus can be raised on habeas corpus. The crux was and is in determining this line in a given case.<sup>7</sup> While

as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24; a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5."

<sup>7</sup> In *United States v. Pridgeon*, 153 U. S. 48, 63 (1894), the Court stated:

"We have not deemed it necessary to review or to attempt to reconcile the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error in relation to proceedings of a court within its jurisdiction—they differ widely as to what constitutes error,

it is interesting to trace the changes, trends and developments in the decisions of the Supreme Court as to what has been regarded as subject to examination for habeas corpus purposes, that is not here necessary. Our present purposes require only the fully supported statement that the scope of examination for habeas corpus purposes in testing confinement under Court sentence has been very greatly extended by recent decisions of the Supreme Court—both as to matters within the trial record (or which might have been raised on the trial)\* and as to matters dehors the record.\* While a few earlier cases had some effect, yet the line of cases here in mind began with *Johnson v. Zerbst*, 304 U. S. 458 (1938), and was accelerated in effect by subsequent decisions—perhaps and what should be regarded as rendering the judgment or proceedings void.”

\* In addition, it should be stated that there is a recent expression of the Supreme Court which may mean an extension of the remedy beyond jurisdictional issues. In *Waley v. Johnston*, 316 U. S. 101, 104 (1942), the Court stated: “The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Bowen v. Johnston*, 306 U. S. 19, 24.” This is approvingly quoted in *House v. Mayo*, 324 U. S. 42, 46 (1945).

\* For an example, compare *Riddle v. Dyche*, 262 U. S. 333 (1923), with *Mooney v. Holohan*, 294 U. S. 103 (1935).

particularly *Bowen v. Johnston*, 306 U. S. 19 (1939); *Walker v. Johnston*, 312 U. S. 275 (1941); *Holiday v. Johnston*, 313 U. S. 342 (1941); *Waley v. Johnston*, 316 U. S. 101 (1942); *House v. Mayo*, 324 U. S. 42 (1945); and *White v. Ragen*, 324 U. S. 760 (1945). Such extention has been one of the main causes for the present situation.

Another cause is that recent decisions have added substantially to the adjudicated matters of fact dehors the record which will invalidate conviction.<sup>19</sup>

Other related and contributing causes are recent decisions of the Supreme Court which have lessened the influence of the presumption of regularity carried by the conviction judgment when attacked collaterally; and those which have further defined the requisites at the "hearing" on habeas corpus required by the statute (28 U. S. C. A. § 461). Under present decisions, if a habeas corpus petition states facts which, if true, would warrant discharge of petitioner, such statement must be taken as true unless denied by respondent. If so denied, an issue of fact is raised. Such issue must be tried on testimony before the court as in ordinary cases (*Walker v. Johnston*, 312 U. S. 275, 284-286 (1941)) and cannot, under the statute, be tried on affidavits (same citation) nor heard before a Commissioner (*Holiday v. Johnston*, 313 U. S. 342, 350-354 (1941)). While the presumption of regularity attaches to the conviction court judgment, yet it is confined to casting a decided burden of proof upon petitioner—who, in any kind of case as plaintiff, would have the burden of proving his case.

Also, special situations have arisen in the procedure in certain States Courts which, in the light of recent Supreme Court decisions, have resulted in additional habeas corpus cases—particularly in the Supreme Court. Such a situation in Illinois is set forth in *White v. Ragen*, 324 U. S. 760, 762 footnote 1 (1945).

Since the prisoner has now a right to testify—to be present—at the hearing (*Holiday v. Johnston*, 313 U. S. 342, 353–354 (1941)) and since he usually can proceed without expense to himself (*in forma pauperis*), very many prisoners have taken advantage of the situation. They had nothing to lose; might possibly gain a discharge; and certainly would have a trip out of prison. All they had to do was to draw up a petition alleging one or more of the matters of fact which the courts have held would invalidate a conviction.<sup>10</sup>

Thus a series of good decisions designed to protect sentenced prisoners from unlawful confinements has been improperly taken advantage of by them. Thus they have created the present situation of abuse of the writ to the extent that

<sup>10</sup> Without attempting a comprehensive list, it may be useful to set out a few of the more common grounds alleged in these habeas corpus petitions in order to indicate the character and range thereof. Such are: denial of counsel, insufficiency of representation by counsel, denial of opportunity to prepare defense, improperly induced to plead guilty, not correctly apprised of charge against him, denied compulsory process to procure witnesses, perjured testimony induced by prosecution, suppression (by prosecutor) of evidence showing innocence, and coerced confession.

it now seems to require remedy. Any remedy must come from the Congress.<sup>2</sup>

These Bills represent the suggestions of the Judicial Conference to the Congress for legislation which, it is believed, will afford the needed relief.

## II. EXPLANATION OF THE BILLS

One of the Bills in each House (S. 1451, H. R. 4233), is Jurisdictional. The other (S. 1452, H. R. 4232) is Procedural.

### *The Jurisdictional Bill*

This Bill has two sections. The first section is concerned solely with imprisonment under State court sentence; the second section concerns imprisonment solely under Federal court sentence. The legal and practical considerations for a different approach, in Federal court habeas corpus proceedings, to sentences in State courts and to sentences in Federal courts is evident and has been long recognized by the Congress and the Courts.<sup>3</sup>

SECTION 1. The broad effect of this section is to require that collateral attacks upon the validity of confinements on sentences of State courts, because alleged to be in violation of the Constitu-

<sup>2</sup> In 1807, the Supreme Court, by Chief Justice Marshall, stated: "the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 4 Cranch \*75, \*94.

<sup>3</sup> The Judiciary Act of 1789, 1 Stat. 73, 81, § 14, expressly limited the remedy to Federal confinements and was not extended to the States in any respect until the Act of 1833 (4 Stat. 632, 634, § 7).

tion, treaties or law of the Nation, shall be determined in State courts with power in the Supreme Court of the United States to review on certiorari. Apparently, the only instances in which such procedure might be inadequate are (1) where a State has no efficient remedy or (2) where the State remedies (though adequate generally) are insufficient to protect the rights of the prisoner in some particular instance because of the existence of "exceptional circumstances." The broad phrase "exceptional circumstances" is intended to cover situations peculiar to the particular case—such as mob interference, strong adverse public sentiment, et cetera.

In both of these two instances of State procedure inadequacy, original jurisdiction is retained in the United States courts to be exercised as follows: *first*, a petition for habeas corpus may be filed before any Circuit or District Judge (within the Circuit or District where the petitioner is confined) whose duty is promptly to determine whether there is reasonable ground to believe that an adequate State remedy is lacking or whether any "exceptional circumstance" exist; *second*, if such judge determines adversely to petitioner, an appeal is given to the proper Court of Appeals; *third*, if such judge determines in favor of the petitioner, the writ is issued and a statutory court of three judges is constituted to try the case; *fourth*, a right to apply direct to the Supreme Court for certiorari to review the determination of the statutory Court.

It is believed that the section provides complete protection to State prisoners; will prevent conflicts between State and lower Federal courts

in all but exceptional situations; and, even in such situations, will provide a special Federal Court so constituted as to minimize State irritation.<sup>12</sup>

**SECTION 2.** This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, *coram nobis*.<sup>13</sup> The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus. However, to take care of situations where, for practical reasons it is not advisable to remove a petitioner from prison and to be certain that the remedies afforded prisoners will be fully sufficient, the section goes further than prescribing the motion remedy. In these exceptional instances where it may seem that the motion remedy is not practicable, because of the prisoner's "inability to be present

<sup>12</sup> The unseemliness of a single Federal judge setting at liberty a person convicted by a State court is noted in *Ex parte Royall*, 117 U. S. 241, 253 (1886).

<sup>13</sup> "The writ of *coram nobis* or *coram vobis* was a common law writ, the purpose of which was to correct a judgment for errors of fact in the same court in which it was rendered" (3 Am. Jur. 766, § 1276). This remedy, in so far as it might have been usable, has been succeeded (in United States courts) by a motion (*Wetmore v. Karrick*, 205 U. S. 141, 151 (1907)). For examples of the use of *coram nobis* in State courts in criminal cases, see *Ernst v. Wisconsin*, 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681 and note; *Alexander v. State*, 20 Wyo. 241, 123 Pac. 68; *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38; *People v. Perez*, 9 Cal. App. 265, 98 Pac. 870; *Sanders v. State*, 85 Ind. 314; *State v. Richardson*, 291 Mo. 566, 237 S. W. 765.

at the hearing on the motion, or for other reasons," habeas corpus is made available. It will be noted that there is provided a wide discretion in the use of habeas corpus where, "for other reasons," the motion remedy seems not "practicable." This will take care of any exceptional practical situation which may arise in any particular case.

The two main advantages of such motion remedy over the present habeas corpus are as follows: *First*, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (*Ex parte Tom Tong*, 108 U. S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U. S. C. A. § 461), the Court or Judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see *Médley* petitioner, 134 U. S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate."

*Second.* Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal (one or all of them) are required to attend the habeas corpus hearing as witnesses. Such attendance is sometimes necessary to refute particular testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witnesses present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. Some realization of the possible extent of this burden on Court officials may be gained from the bare statement that, while convictions occur in all of the Districts throughout the country, federal prisoners are confined in a very small number of penal institutions; and habeas corpus must now be brought in the District where the petitioner is confined. Even if the testimony of these officials is taken by deposition, the interference and interruption is merely lessened in degree and the above danger is risked.

The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file base-

less motions in order to have a "joy ride" away from the prison at Government expense.

Balancing these, as well as less important, considerations, the Conference is of opinion that the advantages outweigh and that the motion remedy is preferable. As to the risk (escape or delivery) while transporting the prisoner to the District of conviction, the difference is only one of degree—of distance and, therefore, of opportunity. As to the expense, it is highly probable that it would be more expensive for the Government witnesses to go from the District where sentence was imposed and return than for the prisoner to be brought to such District and returned. As to the incentive to file petitions, the difference is between a longer and a shorter trip to the Court. It is thought that the provision in Section 2 providing for habeas corpus (in the District of confinement) where it is not "practicable to determine his rights" \* \* \* on such a motion will furnish a sufficient discretion in the judge or court before whom habeas corpus is filed to evaluate and defeat the above "disadvantages" to a large degree.

Other provisions of the section are merely implementing or supplemental to the above outlined purposes and are self-explanatory.

### *The Procedural Bill*

This Bill contains seven sections confined to different features of procedure which experience seems to show are necessary or useful.

SECTION 1: This section is intended to accomplish four things: (1) to prevent "shopping around" from court to court and from judge to

judge, or repeated petitions (on the same grounds) to the same court or judge; (2) to compel petitioner to state in his petition all of the grounds for the writ then known to him; (3) to afford unlimited opportunity to present any grounds which petitioner may thereafter discover at any time; (4) to afford unlimited opportunity to apply for rehearing even upon petitions theretofore presented.

As to the first purpose, the necessity therefor has been sufficiently outlined hereinbefore. It may be added that the Congress, in one instance, has already confined habeas corpus to one petition upon the same grounds (The Act of June 6, 1900, "making further provision for a civil government for Alaska," 31 Stat. 321, 429, § 608).

The second purpose is self-explanatory and would seem to require no elaboration. Also see *Wong Doo v. United States*, 265 U. S. 239, 241 (1924).

The third purpose is brought about by allowing presentation of a subsequent petition based upon "new" grounds "not theretofore presented and determined."

The fourth purpose is accomplished by allowing a "rehearing", without time limit, for presentation not only of any fact situation discovered after the first trial or any subsequent applicable change in law (statutory or decision) which might have affected the first determination; but also any grounds presented by the first petition.

Thus, the fullest rights of the prisoner are preserved and, at the same time, repetitious petitions and hearings are lessened.

SECTION 2. The purpose of this section is to

afford an opportunity to avoid interruption of the sentencing judge's work from having to attend the habeas corpus trial or having his deposition taken.

SECTION 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SECTION 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings by the same petitioner.

SECTION 5. The purposes of this section are to relieve petitioner from the binding effect of an untraversed return, which he may have inadvertently failed to deny; and to give to the answer to a notice to show cause the same evidentiary effect as a return to the writ.

SECTION 6. The purpose of this section is to make material portions of records of conviction readily available to the court.

SECTION 7. The purpose of this section is to enable a pauper petitioner to obtain such portions of the records on conviction as may be pertinent to his habeas corpus case.

#### CONCLUSION

The endeavor here is to set forth the necessity for Congressional action and the reasons for the specific legislation which the Judicial Conference suggests will meet the situation. There can be little room for doubt that such necessity exists. This Statement is respectfully submitted with an expression of our desire to be of any further aid to the Committees on the Judiciary which they may indicate.

TABLE I.—*Supreme Court*

Number of petitions—original (for leave to file) and certiorari—filed and granted in each of the October Terms for 1942, 1943, and 1944, that is, from October 1942 to October 1945.

	1942		1943		1944	
	Filed	Granted	Filed	Granted	Filed	Granted
Original	83	0	105	0	100	0
Certiorari	74	2	134	3	216	4
Total	157	2	239	3	316	4

This Table shows a total of 712 petitions in the last three years, of which 9 were granted. Of the 9 granted, all were on certiorari. Of these 9, the disposition by the Supreme Court was as follows: 4 were vacated and remanded; 4 were reversed and remanded; and 1 was dismissed.

Of the 288 "Original" petitions, 69 were filed by 28 persons who filed more than one original petition *before the Supreme Court* during these three years. Of these 28 persons, 19 filed two such petitions each; 6 filed three each; 2 filed four each; and 1 filed five petitions.

While a complete study has not been attempted because of difficulties of identification, yet there is some information as to the number of petitions filed in the District Courts *by these "repeaters" in the Supreme Court*. This shows, what is not unusual, that 3 of such petitioners each filed also 3 petitions in the District Courts; 4 filed 4 such petitions; 1 filed 5 such petitions; 1 filed 6 such petitions; and 1 filed 11 such petitions.

TABLE II.—*District Courts*

Total Petitions filed for two years (1936 & 1937)	620	Annual Average 310
" " " three " (1943, 1944 & 1945)	2536	" " 845
" Releases. " two " (1936 & 1937)	45	" " 22
" " " three " (1943, 1944 & 1945)	77	" " 26

Percentage of releases to petitions:

Annual Average for 1936 and 1937 is .073%.

" " " 1943, 1944 & 1945 is .030%.

This table does not include the District of Columbia.

The particular years were selected for the purpose of showing trends. The years 1936 and 1937 immediately preceded *Johnston v. Zerbst*, decided May 1938, while the three years (1943-5) bring the data up to date.

The increase in number of petitions and the relative decrease in percentage of releases are indicative of two things: the growing increase of the burden upon the courts and the growing worthlessness of the cases.

*Repeaters.* During the three years (1943, 1944 and 1945) 179 petitioners filed 2 petitions; 70 filed 3 petitions; 25 filed 4 petitions; 2 filed 5 petitions; 5 filed 6 petitions; 1 filed 7 petitions; 1 filed 9 petitions; and 1 filed 11 petitions. Practically all releases were upon the first petition—thus indicating the harassment of busy courts and judges by repeated filing of worthless cases.

E. REPORT OF THE HABEAS CORPUS COMMITTEE  
SUBMITTED AT THE 1947 SPECIAL SESSION OF THE  
CONFERENCE

*Report of Habeas Corpus Committee*

*To the Chief Justice of the United States and  
the Judicial Conference of Senior Circuit  
Judges:*

The Committee on Habeas Corpus Procedure, to which the Conference referred the "jurisdictional bill," H. R. 6723 79th Congress 2d Session, for further consideration and action, met pursuant to the call of the Chairman in the Supreme Court Building in Washington, D. C., on Monday, December 16, 1946, with all members of the Committee present except Judge Kimbrough Stone, whose attendance was prevented by the illness of his wife. Also in attendance were Judge Maris of the Third Circuit, Judge Holtzoff of the District of Columbia, Messrs. Whitehurst and Shafroth of the Administrative Office, and Messrs. Bergson and Bainton of the Department of Justice.

The Committee first gave consideration to the one year limitation provision, which is not contained in the original bill as approved by the Conference. The Committee was of opinion that it was neither feasible nor desirable to include this limitation in the bill. Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and, if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity

of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had originally insisted upon the limitation, withdrew support of it and concurred in the views of the Committee.

The Committee next gave consideration to the provision contained in the original bill for a special court of three judges to hear cases involving the validity of the judgment of a state court, where the application for habeas corpus is found by a District Judge to be meritorious. The Committee was of opinion that this provision should be restored. It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that not until recently was it possible for proceed-

ings in a state court to be reviewed by any federal court except the Supreme Court of the United States, where review was by appeal, writ of error or certiorari. The expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal District Court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been haled into the federal court and examined as witnesses as to the regularity and propriety of the state court proceedings. It is the view of the Committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and, on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this machinery for the proper hearing of evidence and appraisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it, so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Your Committee has accordingly redrafted H. R. 4233 of the 79th Congress 1st Session, the bill originally approved by the Conference, with certain verbal changes which are thought to make its meaning clearer, and submits it with the recommendation that it be approved by the Conference and that its passage be recommended to Congress. Your Committee deems it unnecessary to repeat

what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

While the Conference did not re-refer to the Committee the procedural bill approved by the Conference, H. R. 4232, 79th Congress 1st Session, the Committee thought it not improper to give consideration to its provisions. The Committee again approves the bill, except that three members of the Committee, Judges Stephens, Underwood and Wyzanski, think that the language immediately following the enacting clause should be "That no Circuit or District Judge shall be required to entertain" etc., instead of "shall entertain" etc., as at present contained in the bill. Their view is that the act should make the entertaining of subsequent petitions for habeas corpus discretionary with the judge instead of establishing the rule of res judicata to the extent proposed by the bill. These judges are attaching to the report a memorandum of their views in regard to this matter and Judge Stephens, who expects to attend the next meeting of the Conference, will, in addition, state his views orally to the Conference.

Attached hereto are copies both of the jurisdictional bill as approved by the Committee and the

procedural bill as approved by the Conference, as to which the Committee as a whole suggests no changes but three members of the Committee propose the change above outlined.

JOHN J. PARKER, *Chairman.*

ALBERT LEE STEPHENS.

E. MARVIN UNDERWOOD.

EDGAR S. VAUGHT.

CHAS. E. WYZANSKI, JR.

The report is not signed by Judge Kimbrough Stone.

MARCH 1, 1947.

A BILL To regulate the review of judgments of conviction in certain criminal cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitution, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ

of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U. S. C. 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U. S. C. 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered,

to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted

as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

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A BILL To regulate habeas corpus proceedings in the courts of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.*

SEC. 2. On a hearing of an application for a

writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them

as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

REPORT OF JUDGES STEPHENS, UNDERWOOD AND WYZANSKI WITH REFERENCE TO PROCEDURAL BILL

*To The Chief Justice And The Senior Circuit Judges In Conference:*

The main report of our committee correctly states that the undersigned members of the committee are not in favor of that part of H. R. 4232, which applies the doctrine of res judicata to proceedings for the writ of habeas corpus. We think the long line of decisions, announcing the rule that res judicata does not apply to petitions for habeas corpus, should not be legislated out of the law. Even the quite aggravating and indefensible practice of "peddling" unmeritorious petitions of the same content around to different judges, after adverse rulings, does not afford a sufficient reason for irretrievably shutting off this historic writ of freedom with one court decision. Unjust and illegal imprisonment, by decree of court, despotic rulers, committees of citizens,

or by scheming individuals, has been and continues to be a prime unatnable crime of man, causing unjust suffering and tragedy. No trouble or inconvenience to officials of our government, or cost to it, can justify the withdrawal of the right to a free, open and adequate official investigation into an imprisonment where the prisoner or someone for him asserts, as facts, statements which, if true, would establish its illegality. We venture to assert that there is no duty of a judge that transcends in importance the entertainment of the writ of habeas corpus.

The legislation proposed by the committee and known as H. R. 4232 limits the right to have any petition for the writ considered if the ground therein alleged as good cause has been once passed upon. That a judge may have erred and the prisoner may have overlooked his right of appeal or have been held in circumstances which have prevented his appeal makes no difference. That the writ may have been denied for the lack of proof and a witness to supply the lack becomes available perhaps years later makes no difference. A corrupt, vindictive or vicious man, a callous jailor, a careless or erring judge, a thousand combinations of circumstances, may cause the one and only petition allowable to fail. We refer to the case of *Johnston v. Wright*, 137 Fed. 2d 914, cert. denied U. S. Sup. Ct. Bull. V. 7, No. 11, Jan. 6, 1947, in which the prisoner's contention was sustained only upon the fourth repetitious petition filed. See *Kessler v. Strecker*, 307 U. S. 22, 25, 26.

We very earnestly believe that the bill, as it stands, is wrong and not within the spirit of the

constitutional provision that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

We apprehend that if the bill in its present form becomes a law, judges will find it necessary to whittle away at it in many ways in order to prevent instances of great and obvious injustice. This practice is always an unwelcome duty to the judge, and many injustices will result before judicial interpretation robs the law of its threat to corrective justice. There is another angle to the question. The writ of habeas corpus is an ever-present warning to those who would unjustly, by intention or by carelessness, deprive a person of his liberty. Everyone knows that courts are always ready to throw their full power into an inquisition as to the legality of an imprisonment; such potential action is a deterrent which never can be measured.

While we unqualifiedly favor all parts of the bill, except Section 1 thereof, to which the above exclusively refers, we doubt the urgency or desirability of any limiting legislation for the reason that authoritative decisions have already pointed the way to prevent abuses of the writ of habeas corpus. In *United States ex rel. McCann v. Thompson* (Cir. 2), 144 Fed. 2d 604, 606, we find the following:

While it is quite true that an order dismissing one writ of habeas corpus does not formally estop the relator from suing out another on the same grounds, that does not mean that he may again and again call upon the court to repeat its rulings.

Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict. *Salinger, Jr. v. Loisel, United States Marshal*, 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989; *United States ex rel. Bergodoll v. Drum*, 2 Cir., 107 F. 2d 897, 129 A. L. R. 1165. We refuse therefore to take up the second question upon this appeal.

See also, *United States ex rel. Kulick v. Kennedy, Warden*, 157 Fed. 2d 811, 813. It was said in *Swihart v. Johnston*, 150 Fed. 2d 721, 722 (Cir. 9), that:

Although the doctrine of res judicata does not apply to a judgment refusing to discharge a prisoner on habeas corpus, it does not follow that a refusal to discharge on one petition is without bearing or weight when a later petition is being considered. Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is a prior refusal to discharge on a like petition.

Cert. denied in 66 S. Ct. 803. Many citations from the United States Supreme Court and the circuits are added in the notes to this opinion.

We respectfully submit that the bill goes much too far. We propose that the conference of senior judges, if it sees fit to recommend its passage, do so only after the changes are made which we here propose. For ready reference,

we quote Section 1 of the bill as it is printed. We have, however, indicated where deletions are recommended by drawing a line through the text, and we have underlined all suggested additions.

**A BILL To regulate habeas corpus proceedings in the courts of the United States.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall or district court shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a any writ of habeas corpus and the petition presents no new ground not theretofore presented and determined and the judge or court is satisfied that the ends of justice will not be served by such entertainment.* A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. The term "circuit judge" as used herein shall be deemed to include the judges of

the United States Court of Appeals for the District of Columbia.

ALBERT LEE STEPHENS,

*United States Circuit Judge.*

E. MARVIN UNDERWOOD,

*United States District Judge.*

CHARLES E. WYZANSKI, Jr.,

*United States District Judge.*

FEB. 20, 1947.

F. LETTER TO ALL CIRCUIT AND DISTRICT JUDGES

MAY 2, 1947.

To *United States Circuit Judges,*

*United States District Judges:*

Pursuant to action of the Judicial Conference of Senior Circuit Judges at its recent special meeting held April 21 and 22, 1947, I herewith transmit for your consideration and comment, two proposed bills designated "A" and "B" in reference to habeas corpus procedure, which have received the approval of the committee of the Judicial Conference on that subject, "A" being commonly referred to as "the jurisdictional bill" and "B" as "the procedural bill". I inclose also a report concerning the bills by Circuit Judge John J. Parker, chairman of the committee of the Conference and another jurisdictional bill designated as "X", differing from "A" and referred to in the report of Judge Parker.

The committee and the Judicial Conference will be glad to have an expression of your views in regard to the proposed legislation. Letters on the subject may be sent to Mr. Will Shafrroth of this office who is acting as secretary of the

committee and who will bring them to the attention of the committee and the Judicial Conference. It is also requested that the measures be considered by the legislative committees and the judicial conferences of the various circuits, and that expressions of the conferences be reported to Mr. Shafroth so that when the Judicial Conference of Senior Circuit Judges meets in the fall, it will be advised of the opinions of the judicial conferences in the circuits as well as of the individual judges.

It will be a convenience if letters on the subject to Mr. Shafroth may be sent in duplicate.

Sincerely yours,

HENRY P. CHANDLER.

MEMORANDUM BY JUDGE PARKER

*Proposed Legislation Relating to Habeas Corpus*

This memorandum is prepared to be sent by the Administrative Office with two proposed bills which have received the approval of the Committee on Habeas Corpus, and which the Judicial Conference of Senior Circuit Judges has ordered sent out to the Circuit and District Judges of the Country in accordance with its plan for the consideration of proposed legislation. The bills relate to applications for habeas corpus in the limited class of cases in which the petitioner is imprisoned under the judgment of a state or federal court. One relates to jurisdiction in such cases and is attached hereto marked "Statute A"; the other relates to procedure and is attached hereto marked "Statute B".

There is some history back of the proposed

legislation. Following decisions of the Supreme Court, which permitted persons accused of crime to attack the proceedings under which they were convicted by mere allegation in habeas corpus proceedings of denial of constitutional rights and to support such allegations by proof of matters dehors the record, there was a flood of applications for habeas corpus throughout the country by persons who had been duly convicted of crime and were serving sentences in state and federal penitentiaries. Since the principle of res judicata was not thought to apply to habeas corpus proceedings, the petitions were presented again and again and to different judges. Need for some sort of corrective legislation was widely felt, and in 1942 the Judicial Conference appointed a committee to inquire into the matter and make report. Appointed on the Committee were Circuit Judge Stone of the Eighth Circuit, Circuit Judge Stephens of the Ninth Circuit, District Judge Vaught of Oklahoma, District Judge Underwood of Georgia, District Judge Wyzanski of Massachusetts, and the undersigned, who was named chairman. A careful study of conditions was made with the aid of the Administrative Office; and after a meeting which lasted several days and in which every phase of the problems presented was carefully discussed with representatives of the Administrative Office and the Department of Justice, the committee made a report proposing that the Conference give its indorsement to two bills which were presented with the report. The bills were carefully gone over by the Conference; and amendments suggested by Chief

Justice Stone and Judge Phillips of the Tenth Circuit were incorporated, and the bills were then indorsed by the Judicial Conference on two separate occasions. The bills as thus indorsed were substantially the bills attached hereto as "Statute A" and "Statute B".

At the request of the Conference the two bills which it had indorsed were introduced in Congress on October 1, 1945, the jurisdictional bill being H. R. 4233 and the procedural bill being H. R. 4232. On June 10, 1946, there was introduced another jurisdictional bill, omitting the provision for a three judge court which had been provided for certain cases and adding a one year statute of limitations. A copy of that bill, marked "Statute X" is sent herewith. At the October 1946 session of the Conference, the Habeas Corpus Committee was directed to give consideration to this "Statute X". The committee reported that the provision for a three judge court should be restored to the jurisdictional bill and the one year statute of limitations eliminated from it. At the same time the committee gave renewed indorsement to the procedural bill, but three members of the committee urged that that bill be changed in one particular.

At the session of the Conference on April 21st and 22nd, 1947, consideration was given to the report of the committee, and the committee members present in the Conference acceding in principle to the suggestion of change in the procedural bill made by the three members, the Conference directed that the two bills as thus approved by the committee, with certain stylistic or verbal changes which had been suggested, be sent out for the

consideration of the Federal Judges and Circuit Conferences throughout the country. Your attention is accordingly invited to the proposed "Statute A" and "Statute B" hereto attached, with the request that you advise Mr. Will Shafroth, who is acting as secretary of the Habeas Corpus Committee, of your views with respect to the proposed legislation and of any action taken by any of the Circuit Conferences with respect thereto so that he may bring same to the attention of the committee and the Conference of Senior Circuit Judges.

*Reasons for the Proposed Legislation*

It was the opinion of the committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the applica-

tion was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated.

*Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Johnson v. Zerbst*, 304 U. S. 458; *Bowen v. Johnston*, 306 U. S. 19, 24; *Waley v. Johnston*, 316 U. S. 101, 104. As said in the case last cited:

The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Bowen v. Johnston*, 306 U. S. 19, 24.

In the recent cases of *Carter v. People of Illinois* — U. S. —, 67 S. Ct. 216, the Court said:

The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney v. Holohan*, 294 U. S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of a prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith v. O'Grady*, 312 U. S. 329; *Cochran v. Kansas*, 316 U. S. 255; *Pyle v. Kansas*, 317 U. S. 213; *Sharpe v. Buchanan*, 317 U. S. 238; *People v. Wilson*, 318 U. S. 688. And when state remedies have been exhausted, habeas corpus proceeding can no longer be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist". See cases last cited. It has been expressly held that habeas corpus will lie where there is allegation that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and

that his remedies under state law have been exhausted. See *Mitchell v. Youell*, 4 Cir. 130 F. 2d 880; *Carey v. Brady*, 4 Cir. 125 F. 2d 253; *Gall v. Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker v. Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell v. Youell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal district court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceed-

ings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another district court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, this is an abuse which should be corrected. It is clear that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half dozen or more judges; and each is bound to give it consideration without any regard to the principle of res judicata.

#### COMMENTS ON STATUTE A, THE JURISDICTIONAL BILL

SECTION 1. It will be observed that the first section of this proposed statute applies only to the case of prisoners in custody under judgments of state courts. The first sentence of the section, which requires that remedies under state law be

exhausted, is merely declaratory of existing law as declared by the Supreme Court; but it is thought wise to include in the statute this important limitation on the right to apply for habeas corpus in the federal courts. The remainder of the first section provides for a court of three judges, where remedies under state law have been exhausted and the application is found to be meritorious. This provision was omitted from "Statute X", but the committee was of opinion that it should be restored.

It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that, as pointed out above, not until recently was it possible for proceedings in a state court to be reviewed by any federal court except the Supreme Court of the United States, where review was by appeal, writ of error or certiorari. The

expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal district court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been haled into the federal court and examined as witnesses as to the regularity and propriety of the state court proceedings. It is the view of the committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and, on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear

is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this machinery for the proper hearing of evidence and appraisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it; so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Objection is made that convening a court of three judges would impose a burden upon the judiciary of the Circuit; but this burden it is believed will be inconsequential. Only where the district judge decides that the application is meritorious, must he cause a court of three judges to be constituted; and, since the application must show upon its face that remedies under state law have been exhausted, an application which could be held meritorious, i. e., one which the court should entertain, would be very rare.

The committee considered taking away entirely the right of the lower federal courts to review by habeas corpus the proceedings of state courts and to confine this power of review to the Supreme Court of the United States. The Supreme Court, however, is manifestly not willing that its review be confined to the record made in the state court, and the Supreme Court cannot be burdened with the hearing of evidence in this class of cases. A court of three judges to hear the evidence and make a record in those rare cases where all state remedies have been exhausted and there is meritorious petition for relief in the federal court for alleged denial of constitutional rights by state courts, would seem to meet in an appropriate way the problem presented. The machinery thus provided would seldom be used; but, if occasion for its use should arise, it would provide a remedy in keeping with the spirit of our institutions and fitted to deal with the delicate adjustment of state and federal power necessarily involved.

SECTION 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday v. Johnston*, 313 U. S. 342, 349. The last part of the section provides that no application for habeas corpus shall be entertained in behalf of any prisoner entitled to

relief under the motion unless it appears that it is not practicable to determine his rights in that way. The purpose of the section is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter. The power to grant relief under habeas corpus where injustice would otherwise result is carefully preserved.

The committee decided that it was neither feasible nor desirable to include in the statute the one year limitation prescribed by section 2 of "Statute X". Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had originally insisted upon the limitation, withdrew support of it and concurred in the views of the committee.

#### COMMENTS ON STATUTE B, THE PROCEDURAL PROVISIONS

**SECTION 1.** Section one makes it discretionary with a Circuit or District Judge whether or not

he will entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it appears that the legality of such detention has been determined in a prior application for habeas corpus, no new ground is presented in the present application, and it does not appear that the ends of justice will be served by further inquiry.

SECTION 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SECTION 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SECTION 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SECTION 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECTIONS 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

JOHN J. PARKER,  
*Chairman, Habeas Corpus Committee.*

## STATUTE A

**A BILL** To regulate the review of judgments of conviction in certain criminal cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitution, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise, files, or there is filed in his behalf, a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted in the manner provided by the Act of August 24, 1937, ch. 754, sec. 3, 50 Stat. 752 (28 USC 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court*

of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate of probable cause required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40 28 USC 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SECTION 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court

finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his right to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia, and the term "district judge" shall be deemed to include justices of the District Court of the United States for the District of Columbia.

## STATUTE B

**A BILL To regulate habeas corpus proceedings in the courts of the United States.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge or district court shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia, and the term "district judge" shall be deemed to include justices of the District Court of the United States for the District of Columbia.*

**SECTION 2.** On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall

be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SECTION 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SECTION 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SECTION 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SECTION 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SECTION 7. If on any application for a writ of

habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

#### STATUTE X

A Bill To regulate the review of judgments of conviction in certain criminal cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity, under the Constitution, treaties, or laws of the United States, of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. The phrase "no adequate remedy" as used in this section means absence of such State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the particular petitioner. An appeal shall lie to the circuit court of appeals from an order of discharge or, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76, 35*

Stat. 40, 28 USC 466), from an order denying discharge.

SECTION 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties, or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless such court shall determine that the motion presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the

motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time. The process of the court wherein such motion is filed may be served at any place within the

jurisdiction of the United States. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

G. REPORT OF THE HABEAS CORPUS COMMITTEE SUBMITTED AT THE REGULAR 1947 SESSION OF THE CONFERENCE

*Report to the Judicial Conference of the Committee on Habeas Corpus*

*To the Chief Justice of the United States and the Judicial Conference of Senior Circuit Judges:*

The Committee on Habeas Corpus begs leave to submit the following report.

Pursuant to direction of the Judicial Conference at the special meeting held April 21 and 22, 1947, your Committee sent out to all the Circuit and District Judges of the United States the proposed statutes relating to Habeas Corpus which had been considered by the Conference. The Committee has heard from a large number of judges, practically all of whom approve most of the features of the proposed statutes, but a number of whom expressed themselves as opposed to the provision for a three judge court in certain cases. A number offered constructive suggestions of value. The Judicial Conference of the 1st, 2d, 3d, 5th and 10th Circuits endorsed the proposed legislation. The Conferences of the 7th, 8th and 9th Circuits endorsed it except as to the three judge court provision, which they opposed.

Since the meeting of the Conference in April the House of Representatives has passed H. R. 2055 revising the Judicial Code and this bill is now before the Senate and has been referred to the Senate Judiciary Committee for consideration. Chapter 153 of that codification deals with the subject of habeas corpus and incorporates most of the provisions contained in the proposed statutes considered by the Conference. Your Committee, at a meeting held at Cleveland, Ohio, on Sept. 19th, 1947, at which all members were present, gave consideration to the letters and recommendations which it had received from judges, the action of the various conferences, and the chapter on habeas corpus contained in the proposed revision of the Code. While the various members of your Committee have held somewhat different views on some minor features of the proposed legislation, it has seemed to them so important to secure the passage of legislation along the line proposed that they have thought it wise to abandon further consideration of the statutes heretofore under consideration and join in recommending the adoption of the provisions of the Judicial Code relating to *habeas corpus* with the exception of two sections as to which they submit proposed substitutions as follows:

With respect to Section 2244 of the Revision, your Committee submitted a provision authorizing the denial of subsequent applications for habeas corpus in the discretion of the judge where no new ground was presented and the judge was satisfied that the ends of justice would not be served by further inquiry. This provision was explained

to and approved by the judges of the country and on the basis of their approval your Committee recommended that it be substituted for Sec. 2244 as contained in the Revision. A copy thereof is hereto attached, marked "proposed Section 2244." Judge Stone is of opinion that Section 2244 of the Revision should stand, and that no second petition for habeas corpus to a different federal judge should be allowed unless the petition alleges new grounds of fact or a change in the law since the decision on the first petition.

With respect to Section 2254 of the Revision, your Committee is of opinion that the words "or authority of a state officer", as contained in the section, would unduly hamper federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty, and that the last clause of the section, viz, "or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and Laws of the United States", should be omitted as adding an undesirable ground for federal jurisdiction in addition to exhaustion of state remedies or lack of adequate remedy in State Courts. Your Committee recommends, in lieu of Section 2254 of the Revision, the Section, copy of which is hereto attached, marked "Proposed Section 2254." It will be noted that the proposed Section uses the language of Section 2254 of the Revision, omitting the language above quoted and adding two sentences the effect of which is to define more specifically what is meant by exhaustion of state remedies and "no adequate remedy available."

Respectfully submitted this 20th day of September 1947.

JOHN J. PARKER, *Chairman.*  
 KIMBROUGH STONE.  
 ALBERT LEE STEPHENS.  
 EDGAR S. VAUGHT.  
 E. MABVIN UNDERWOOD.  
 CHAS. E. WYZANSKI, Jr.

PROPOSED SECTION 2244

*Finality of Determination*

No circuit or district judge or district court shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry. A new ground within the meaning of this section may include a material change in applicable law subsequent to the prior determination.

PROPOSED SECTION 2254

*State Custody—Remedies in State Courts*

An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless

it appears that the applicant has exhausted the remedies available in the courts of the state or that there is no adequate remedy available in such courts. An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to file another application for habeas corpus. The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

## APPENDIX II

### THE PRACTICE UNDER § 2255, BASED ON INFORMATION OBTAINED FROM UNITED STATES ATTORNEYS

In an attempt to ascertain the practice in hearing Section 2255 motions, a questionnaire was mailed to the ninety-one United States Attorneys. Sixty-three replies were received in time to be utilized in the preparation of this Appendix. A number of the replies stated either that no cases under Section 2255 had been brought in the district or that all motions filed could be disposed of on the motion and the files and record.

1. *Failure of the Government to produce the movant.*—The first question asked was whether there had been any case in which the Government failed to comply with a court order to produce a prisoner confined outside the district for the hearing on his motion. All replies were negative. In *Payne v. United States*, 85 F. Supp. 404 (M. D. Pa.), the court had first "ordered" that "W. H. Hiatt, Warden \* \* \* produce John Robert Payne for said hearing." The order was questioned by the warden. (See Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service, Sec. 51.) Thereafter the court issued a writ of habeas corpus *ad prosequendum*, which was honored by the warden. In *United States v. Kratz*, 97 F. Supp. 999 (D. Neb.), the court entered an order reciting that there was some doubt as to its power to order

the prisoner produced on writ of habeas corpus, and requesting the U. S. Attorney to make arrangements to have him in court. He was thereupon brought from Leavenworth, Kansas, to Omaha, Nebraska, by order of the Bureau of Prisons.

2. *Process used to produce the movant.*—The second question was as to the nature of the process used where necessary to produce the prisoner from outside the district for a hearing on his motion. A writ in the form of the writ of habeas corpus *ad testificandum* was used in fourteen districts:

N. D. Ala.	S. D. Miss.	W. D. Okla.
W. D. Ark.	D. N. Mex.	D. Utah
S. D. Fla.	E. D. N. Y.	S. D. W. Va.
N. D. Ind.	M. D. N. C.	D. Wyo.
W. D. La.	N. D. Okla.	

Five districts used a writ in the form of a writ of habeas corpus *ad prosequendum*:

S. D. Ga.	N. D. Ohio	N. D. Tex.
D. Kans.	M. D. Pa.	

In one district (N. D. Iowa), both of the above forms of writ have been used. In one district (D. Ore.), while no movants have been produced under Section 2255, the United States Attorney assumes that subpoenas *ad testificandum* or *ad prosequendum* would be appropriate and would be honored.

Some of the United States Attorneys gave information concerning specific cases which is tabulated below:

Case	District	District of confinement	Writ form
<i>Berbette, U. S. v.</i>	S. D. Miss.	E. D. Tex.	ad test.
<i>Cherrie v. U. S.</i> , 184 F. 2d 384.	D. Wyo.	D. Kans.	ad test.
<i>Christakos v. U. S.</i>	N. D. Ala.	Not stated	ad test.
<i>Foster v. U. S.</i> , 184 F. 2d 571.	S. D. Ga.	N. D. Ga.	ad pros.
<i>Howard, U. S. v.</i> , Cr. 19519 (See 186 F. 2d 778).	N. D. Ohio	D. Kans.	ad pros.
<i>Jones v. U. S.</i> , 179 F. 2d 303.	S. D. W. Va.	N. D. Ga.	ad test.
<i>Jones, U. S. v.</i> , 177 F. 2d 476.	N. D. Ind.	D. Kans.	ad test.
<i>Kline, U. S. v.</i> , 98 F. Supp. 325.	E. D. N. Y.	State institution outside the district.	ad test.
<i>Kratz, U. S. v.</i> , 67 F. Supp. 999.	D. Neb.	D. Kans.	Transfer by Bureau of Prisons.
<i>Lavelle, U. S. v.</i>	E. D. N. Y.	State institution outside the district.	ad test.
<i>Loiseau, U. S. v.</i> , Cr. 2160.	N. D. Iowa	D. Kans.	ad pros.
<i>Long, U. S. v.</i> , Cr. 19998.	N. D. Ohio	D. Kans.	ad pros.
<i>Mandell, U. S. v.</i>	N. D. Okla.	D. Kans.	ad test.
<i>Monti, U. S. v.</i> , Cr. 41929.	E. D. N. Y.	D. Kans.	Transfer by Bureau of Prisons.
<i>Myers, U. S. v.</i>	N. D. Ind.	D. Kans.	ad test.
<i>Parker v. U. S.</i> , 184 F. 2d 488.	M. D. N. C.	E. D. Va.	ad test.
<i>Payne, v. U. S.</i> , 85 F. Supp. 404.	M. D. Pa.	N. D. Ga.	ad pros.
<i>Rogers, U. S. v.</i>	D. Utah.	W. D. Wash.	ad test.
<i>Rogers, U. S. v.</i>	D. N. M.	D. Kans.	ad test.
<i>Roland, U. S. v.</i> , Cr. 4016.	W. D. Ark.	Not stated	ad test.
<i>Scoggins, U. S. v.</i> , Cr. 438.	S. D. Miss.	Not stated	ad test.
<i>Wilson, U. S. v.</i> , Cr. 12246.	S. D. Ga.	N. D. Ga.	Not stated.
<i>Ziebert, U. S. v.</i>	N. D. Tex.	D. Kans.	ad pros.

In some cases the language of the writ departs from the traditional forms. Thus, in *United States v. Wilson*, Cr. 12246 (S. D. Ga.), the writ, addressed to the warden and the marshal, read in part as follows:

We demand that you deliver the body of Frank Wilson, \* \* \* for the purpose of having him personally appear \* \* \* in a cause in which the said Frank Wilson seeks to have the judgment and sentence imposed upon him in this court on November 30, 1948, in Indictment No. 12246, vacated \* \* \*.

The writ in *Payne v. United States*, 85 F. Supp. 404 (M. D. Pa.), addressed to the warden, read in part as follows:

You are commanded to produce now, in the custody of Carl H. Fleckenstine, United States Marshal, or one of his deputies, \* \* \* the person of John Robert Payne, whom it is alleged you legally [sic] restrain of his liberty and against whom there are pending certain proceedings \* \* \* to the end that he \* \* \* may be heard upon said pending proceedings \* \* \*.

In *United States v. Monti*, Cr. 41929 (E. D. N. Y.), the court ordered—

that the United States Marshal, \* \* \* or his duly appointed deputies \* \* \* produce the said Martin James Monti, now confined in the United States Penitentiary at Leavenworth, Kansas \* \* \* for the purpose of testifying as to the aforesaid matter \* \* \* on condition, however, that the traveling and lodging expenses of said defendant and of the said United States Marshal or his deputies shall be borne solely by said defendant \* \* \*.

Later the prisoner was, by order of the Bureau of Prisons, transferred at government expense to a federal institution in Brooklyn, N. Y., in order to be available at the hearing on his motion. Hearings in open court were had at various times between June 21, 1951 and July 27, 1951 at which the movant testified at great length.

3. *Nature of the hearing on the motion.*—The United States Attorneys were also asked to summarize the procedure followed where a Section 2255 motion raises issues of fact which cannot be

conclusively resolved from the files and records of the case.

Thirty-three replies give some indication of the procedure followed, and are summarized below.

*N. D. Ala.:*

Movant's presence ordered in only factual case, *Christakos v. U. S.*

*W. D. Ark.:*

In the only case which could not be resolved from files and records, an attorney was appointed and given adequate opportunity to confer with the movant. The movant testified at the hearing. A perjury case is now pending against the movant growing out of allegedly false testimony at the hearing.

*S. D. Ga.:*

Counsel was appointed by the court in at least one case. Movant's presence ordered in *Foster v. United States*, 184 F. 2d 571; and *U. S. v. Wilson*, Cr. 12246. It was not ordered in *U. S. v. Van Buren*, Cr. 324—the court entered findings that movant's contentions had been determined adversely to him by the jury at his criminal trial.

*N. D. Ind.:*

The movant's presence was ordered in *U. S. v. Jones*, 177 F. 2d 476.

*S. D. Ind.:*

The court has allowed affidavits, testimony by witnesses from both sides (other than the movant), appointment of counsel and adequate opportunity to confer "at least through correspondence." The movant has not been produced. The United States Attorney notes that the proper pro-

cedure under Section 2255 "was one of the main topics of discussion at the most recent Judicial Conference" for the Seventh Circuit.

*N. D. Iowa.:*

Movant is given notice of the hearing and opportunity to confer with counsel, and is present at the hearing in open court. If he has no counsel he is informed of his right to counsel and counsel is appointed if desired.

*E. D. La.:*

Counsel is appointed, and movant is notified of the date of the hearing. Letters have been considered "in the nature of depositions." Counsel presented movant's views as expressed by correspondence but movant has not been produced in any case to date.

*W. D. La.:*

The movant has been present in all factual cases. Counsel is appointed and testimony taken in open court. Adequate time between arrival of movant and hearing is allowed for preparation by his counsel.

*D. Minn.:*

In the only factual case, *De Jordan v. United States*, 187 F. 2d 263, counsel was appointed, transcripts of two habeas corpus proceedings at which movant had testified were received in evidence, other testimony was taken, the prisoner was not produced.

*S. D. Miss.:*

Apparently the movant has been allowed to be present in some but not in all factual cases. Some cases have been decided on affidavits;

complete hearings have been held in others. Counsel has been appointed on some occasions.

**E. D. Mo.:**

The court usually appoints counsel if requested, and in some cases where not requested. All cases have been disposed of by the United States offering oral testimony at the hearing to establish its version of controversial facts disclosed in the movant's affidavit. The movant's presence has not been ordered in any case.

**D. Neb.:**

In *United States v. Kratz*, 97 F. Supp. 999, the prisoner was produced (See pp. 187-188, *supra*). Several days prior to the hearing, he appeared in court to request that counsel be appointed for him, which was done. He testified at the hearing.

**D. N. M.:**

In one case a full hearing was held with movant present. Testimony from both sides was received. In another case trial counsel for movant was directed to appear, and the court after inspection of the record and hearing statements of trial counsel denied the motion without ordering the movant's presence.

**E. D. N. Y.:**

In three cases the movant was produced. *U. S. v. Lavelle* (unreported); *U. S. v. Kline*, 98 F. Supp. 325; *U. S. v. Monti* (not yet reported). In the *Lavelle* and *Kline* cases counsel was appointed; *Monti* had retained counsel. In *U. S. v. Freundt* retained counsel agreed that production of the movant was unnecessary in view of the voluminous affidavits submitted. In *U. S. v.*

*Donay*, counsel was assigned and requested that the prisoner be produced from Atlanta. The request was denied and the motion decided on voluminous affidavits and the testimony of the movant's trial counsel.

*N. D. N. Y.:*

No cases involving prisoners confined outside the district. In one case, *U. S. v. Benninger*, Cr. 28743, the movant was produced from within the district on writ *ad testificandum*, but at the hearing informed the court that he did not desire to testify.

*S. D. N. Y.:*

In every case the motion has been disposed of on supporting and opposing affidavits without production of the prisoner.

*E. D. N. C.:*

There have been only two factual cases; both involved contentions that a guilty plea was not authorized by the movant. The movant was not present at the hearing. The court examined the record which showed that the trial court had interrogated the movant before sentencing. Trial counsel were interrogated under oath. No notice was given to the movant nor was counsel provided.

*M. D. N. C.:*

The movant is notified and served with the reply of the Government, and in most cases has his trial counsel or court appointed counsel present. He was allowed to be present at the hearing in one case, but not in others. Government witnesses are examined and cross-examined to disprove the movant's contentions. "In most

cases prisoners have not asked to be present and have not asked to be represented."

*W. D. N. C.:*

The movant is advised of the hearing, his right to counsel and the right to file affidavits. In no case has his presence been ordered. The Government ordinarily uses only the record or affidavits.

*N. D. Ohio:*

Movant's presence was ordered in the only two factual cases, *U. S. v. Howard*, Cr. 19519 (see 186 F. 2d 778), and *U. S. v. Long*, Cr. 19598.

*N. D. Okla.:*

Movant has been allowed to be present where factual issues were raised. Testimony is taken in open court.

*W. D. Okla.:*

Movant has been produced in all cases where a factual issue was raised. Counsel is provided and given adequate time to prepare and to confer with movant.

*D. Ore.:*

In the only case where factual issues were tried before the court, *U. S. v. Pillsbury*, Cr. 15132, the issue was whether the trial judge and the U. S. Attorney had made prejudicial remarks before the jury. Testimony of the prosecutor, trial judge, defense counsel and jury foreman was taken. Movant was advised of the hearing, and counsel appointed. Movant was not present at the hearing, but a copy of the transcript of the hearing was forwarded to the movant. In other cases the court has appointed counsel to investigate.

the allegations of the movant which were found to be without merit.

**M. D. Pa.:**

The movant's presence was ordered in at least one case.

**W. D. Pa.:**

In the only factual case, *U. S. v. Gallagher*, 94 F. Supp. 640, the question arose as to the true name of the movant who had been tried for transporting a falsely made check. The court asked the F. B. I. to investigate and decided the factual issue, in the movant's favor, on the basis of the report, without ordering the movant's presence. See 94 F. Supp. 640.

**D. Puerto Rico:**

All cases have been disposed of on files and records. In some, counsel has been appointed and a hearing had, apparently confined to issues of law. The movant has not been produced in any case.

**E. D. S. C.:**

In the only factual case the movant claimed his guilty plea was coerced. The court decided the issue on the basis of the motion and the officer's affidavit denying coercion. The movant was not produced. It does not appear whether the affidavit was served on him.

**N. D. Tex.:**

The movant was produced in the only factual case after order from the Fifth Circuit to hold a hearing with movant present. *U. S. v. Ziebert* (unreported).

**D. Utah:**

In the only factual case, *U. S. v. Rogers*, the movant asserted that a coerced confession had been

used. He was produced a month in advance of the hearing and given ample opportunity to consult with two court-appointed attorneys. Witnesses testified for the Government and were cross-examined. The movant was given an opportunity to testify and to call witnesses. Argument was heard.

*E. D. Wash.:*

In the only case, *Nemoc v. U. S.*, the court heard the testimony on a written brief and letters from the movant who was not brought before the court. Denial of the motion was affirmed by C. A. 9, Sept. 5, 1951.

*S. D. W. Va.:*

"Where the issues raised can be resolved from the file and record" the court appoints counsel and hears the matter without the prisoner being present. The movant's presence was ordered in at least one case, *Jones v. U. S.*, 179 F. 2d 303.

*E. D. Wisc.:*

In the only case presenting factual issues the movant was notified of the hearing and counsel was appointed and given adequate opportunity to confer by correspondence with the movant. The movant was not present at the hearing. Copies of the transcript were made for the movant.

*D. Wyo.:*

In one case, presence of movant was ordered and counsel was appointed by the court. *Cherrie v. United States*, 184 F. 2d 384.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1951**

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**UNITED STATES OF AMERICA, PETITIONER**

vs.  
**HERMAN HAYMAN**

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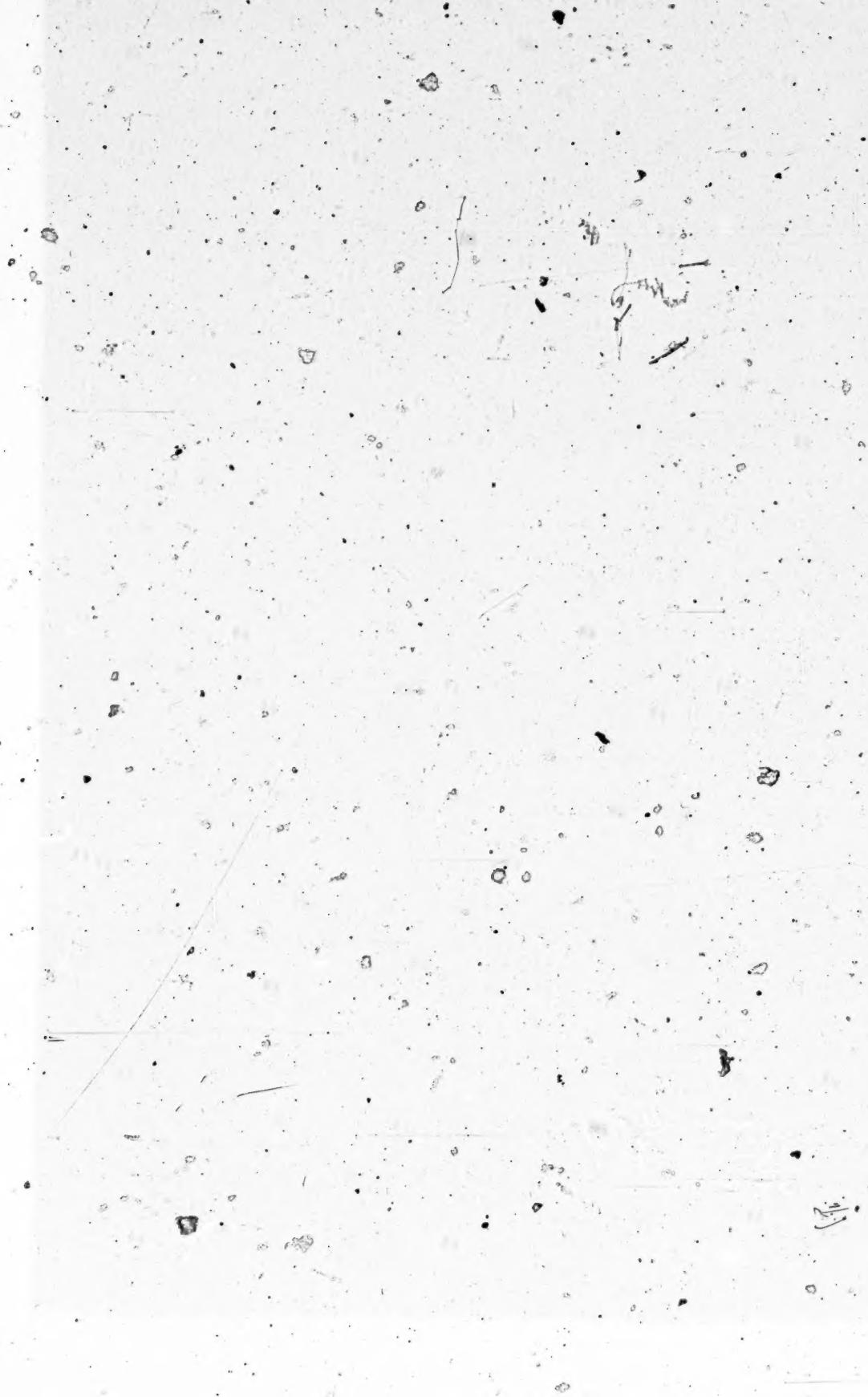
**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**REPLY BRIEF FOR THE UNITED STATES**

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## REPLY BRIEF FOR THE UNITED STATES

This reply brief will deal with certain points raised by respondent which were not treated in petitioner's main brief, or for which a more elaborate discussion now seems advisable. The failure in this brief to meet other points made by respondent is of course not to be taken as a concession of their validity.

Respondent contends in Point I that the motion procedure of § 2255 is inapplicable and inadequate for cases in which factual issues, not determinable on the record are raised by prisoners confined outside the district in which they were tried, and in Point II that the inadequacy of the

procedure requires its invalidation as a suspension of habeas corpus in violation of Article I, Section 9, Clause 2.

## I

Section 2255 should be construed as applicable in this kind of case

The statutory argument advanced by respondent seemingly has two facets: (a) § 2255 is inapplicable because it was not *intended* to apply to cases requiring a factual hearing brought by prisoners confined outside the district, and (b) the procedure is necessarily inadequate in such cases.

A. Section 2255 was intended to be applicable to cases brought by prisoners confined outside the District and requiring a factual hearing

Respondent argues that the Judicial Conference did not intend the motion to be applicable in cases calling for production of the prisoner at a hearing. He asserts that the Conference contemplated a "balance of remedies" (Br. 18) under which "the motion procedure yields to habeas corpus when disputed issues of fact entitle the prisoner to be brought in" (Br. 17). He argues that "there is substantial scope for the employment of the motion procedure" in "motions to correct or reduce sentence, motions resting on allegations that are controverted by the record, motions resting on an unsound legal contention" (Br. 14-15). But as to cases presenting "disputed issues of fact" (Br. 15), he argues that

the motion remedy is frequently, or usually, or almost always inapplicable (Br. 15-18). And he argues that to produce the prisoner in the motion court in such cases "would be in substance a transfer of habeas corpus to the distant sentencing court—a result plainly not contemplated or desired" (Br. 17). He cites nothing in the Judicial Conference materials to support this view. Indeed, those materials are wholly at variance with it.

In the first place, as we have pointed out in our main Brief, the Conference intended to substitute the motion procedure for habeas corpus in substantially all cases involving convictions in federal courts (Govt. main Br. p. 31). The reports of the Conference are unequivocal as to this. The first report of the Habeas Corpus Committee to the conference proposed "that the question as to the constitutional validity of the trial should be raised in the trial court on motion" and that habeas corpus in another court "should not be allowed except in those rare cases where the ends of justice imperatively so require." (Quoted at p. 24, Govt. main Br.) The memorandum submitted by Judge Stone to the Chairmen of the Congressional Committee similarly stated that "The motion remedy broadly covers all situations where the sentence is 'open to collateral attack,'" and that habeas corpus was to be permitted only in "exceptional instances" (App., p. 137).<sup>1</sup> And

<sup>1</sup> "Appendix" as used herein means the Appendix to the main Brief for the United States.

the memorandum of Judge Parker to the circuit and district judges in 1947 repeats the statement that habeas corpus was to be permitted only in "rare cases" (App., p. 167).<sup>2</sup> These statements are totally inconsistent with a theory that would make the motion remedy inapplicable in every case in which the presence of the prisoner at a hearing was necessary to afford adequate relief. Such cases could certainly not be dismissed as "rare" or "exceptional."

In the second place, respondent's theory disregards the fact that the proposals resulting in Section 2255 were supported in the Conference largely because of the need for a new procedure where a trial of facts was necessary. This is shown beyond question in the statements from the first report of the Habeas Corpus Committee, quoted at pages

<sup>2</sup> The Committee on Habeas Corpus subsequently reported to the Conference that (App., p. 182):

"Pursuant to direction of the Judicial Conference at the special meeting held April 21 and 22, 1947, your Committee sent out to all the Circuit and District Judges of the United States the proposed statutes relating to Habeas Corpus which had been considered by the Conference. The Committee has heard from a large number of judges, practically all of whom approve most of the features of the proposed statutes, but a number of whom expressed themselves as opposed to the provision for a three judge court in certain cases. A number offered constructive suggestions of value. The Judicial Conference of the 1st, 2d, 3d, 5th and 10th Circuits endorsed the proposed legislation. The Conferences of the 7th, 8th and 9th Circuits endorsed it except as to the three judge court provisions, which they opposed."

22-24 of our main Brief; in the letter of Mr. Chandler to the Congress "in behalf of the Judicial Conference" (Appendix, p. 106); in the memorandum of Judge Stone to the Committees of Congress, quoted at pages 27-29 of our main Brief (see also Appendix, pp. 137-138); in the 1947 report of the Habeas Corpus Committee, quoted at p. 25 of our main Brief; and in the 1947 memorandum of Judge Parker to the district and circuit judges (Appendix, pp. 167-173). All of these documents speak of the proposed legislation as being primarily addressed to the problems presented by trials of fact "dehors the record".

In the third place, respondent's theory is totally at variance with the express recognition in the Judicial Conference materials that the prisoner could and should be produced in the sentencing court in appropriate cases. Judge Stone's memorandum to the chairman of the congressional committees, quoted at pp. 27-29 of our main Brief, is absolutely explicit as to this. He weighs the relative disadvantages of transporting the prisoner to the motion court or the witnesses to the habeas corpus court, and concludes, contrary to the view advanced by respondent (Resp. Br., p. 44), that the former would be the generally preferable procedure. This statement would be meaningless if the prisoner could not be produced.

Respondent (Br. p. 18) seeks to minimize Judge Stone's memorandum on the ground that it was not submitted to the Judicial Conference or to the Habeas Corpus Committee of the Conference and was not repeated by Judge Parker when he subsequently submitted the bill to all the federal judges for comment (App., pp. 159-173). But Judge Stone was acting at the direction of the Conference on its behalf (Appendix, p. 120), and was undoubtedly fully familiar with the proceedings before and the views of the Conference which he was representing. His statement, moreover, was edited and approved by Chief Justice Stone, the Chairman of the Conference (*id.*, 121). In any event and of even greater consequence, the statement was prepared at the behest of and for the use of the Congressional Judiciary Committees, which were considering the legislation (*id.*, 120-121). In construing this legislation, the intention of Congress is, of course, the primary concern; the understanding of the Judicial Conference is significant to the extent that it may be assumed that Congress relied upon and adopted it.\* So far as appears, Judge Stone's statement was the principal and final report submitted by the Judi-

\* This Court has recognized the relevance of the views of the Judicial Conference in interpreting the habeas corpus provisions of the 1948 codification. *Darr v. Burford*, 339 U. S. 200, 212-213.

cial Conference to the Congressional Committees.<sup>4</sup> Indeed, the only other report available to the Congress was the earlier letter of transmittal by Mr. Chandler, which similarly gave as an example of a case in which relief by motion would be impracticable the case of a "dangerous prisoner" confined thousands of miles from the district (Appendix, p. 113; see main Brief, pp. 29-30), thus clearly implying that production of the prisoner was contemplated in those cases which did not present unusual danger of escape.

Nothing in the prior or subsequent reports of the Habeas Corpus Committee is in any way inconsistent with the views thus expressed by Judge Stone and Mr. Chandler, and certainly nothing purports to disavow those views. On the contrary, the entire tenor of the reports and memoranda, as we have indicated, was that the motion remedy should be resorted to in cases presenting factual issues and that habeas corpus should be permitted only in rare cases. To the extent that production of the prisoner is necessary to effectuate that result, it seems clear that the

<sup>4</sup> Although the bill ultimately was submitted to Congress by the Revisers of Title 28, their work was reported through the same two committees as received Judge Stone's memorandum, and it must be assumed that they had access to the material submitted by those committees.

Conference and its Habeas Corpus Committee contemplated that he should be produced.

**B. Section 2255 provides an adequate remedy**

The legal theory upon which respondent and the court below would hold the Act inapplicable to cases requiring a factual hearing when the prisoner is confined outside the district is that in such cases the motion remedy is necessarily and inevitably "inadequate or ineffective." So to construe those words would, as we have seen, be directly contrary to the purpose of § 2255 and the intention of those who sponsored it.

<sup>5</sup> It is true that it was frequently stated that § 2255 was modeled on the writ of *coram nobis* and that the cases cited by respondent (Br. p. 12) show that in the federal courts a prisoner's presence has not been *required* when relief akin to that available under that writ was sought. *Contra: People v. Richetti*, 302 N. Y. 290, 97 N. E. 2d 908 (1951) and cases cited. But these cases do not suggest that the prisoner may not be brought to court in appropriate cases in the exercise of the court's judicial discretion. Compare *McDonald v. Moinet*, 139 F. 2d 939 (C. A. 6); *Downey v. United States*, 91 F. 2d 223 (C. A. D. C.) in which writs *ad prosequendum* issued to prisoners outside the district. Moreover, the Conference recognized that the proposed remedy was "in the nature of, but much broader than, *coram nobis*" (Judge Stone's memorandum, App. p. 137). In any event, an argument founded upon (a) speculation that by these general references to *coram nobis* the Conference meant to make applicable to the new statute all details of the former *coram nobis* procedure, and (b) further speculation as to the understanding of the Conference as to the right of the prisoner to be present on *coram nobis*, cannot outweigh the very explicit statements quoted above which show beyond question the understanding that under the new statute the prisoner could be produced when appropriate.

In any event, the remedy by motion is not inadequate and ineffective in cases of the sort we are considering. The factors which refute respondent's contentions as to the inadequacy of the motion also, of course, demonstrate that even to make it a complete substitute for habeas corpus—which the statute does not—would not be unconstitutional.

Before discussing the alleged inadequacies of § 2255 in detail, a more generalized statement of what we think the section means may be helpful.

Congress and the Judicial Conference undoubtedly intended § 2255 to be a substitute for habeas corpus when it provided an adequate remedy and assumed that in most, if not all cases, it did provide an equivalent and equally fair procedure. Since it was assumed that the remedy would ordinarily be adequate, resort to the motion was not to be merely an additional step to be taken before seeking habeas corpus. The motion was both a substitute and a prerequisite to the writ—a substitute except in the rare cases in which it would not be adequate or effective.

The section provides that where the motion cannot be determined "conclusively" upon the pleadings, files and records, the court shall "grant a prompt hearing thereon." The word "hearing" obviously means a *fair* hearing. Cf. *Morgan*, v. *United States*, 298 U. S. 468, 480. Certainly this must be true in a statute drafted by the Judiciary. When a hearing will not be

fair without the presence of the prisoner, either to testify or for purposes of preparation, the prisoner has a right—by necessary implication from § 2253 itself—to be present.

The provision in the section that “a court may entertain and determine such motion without requiring the production of the prisoner at the hearing” is not at all inconsistent with such an interpretation. The quoted provision does not say that a prisoner never shall be present, but merely that the prisoner need not always be present. A “hearing” is required under the statute even when only points of law are presented or when factual issues are determinable from files and records, so long as it does not “conclusively” appear that the prisoner is entitled to no relief; but such a hearing would only be a legal argument at which the prisoner’s presence would be unnecessary. Cf. *Walker v. Johnston* 312 U. S. 275, 284-285. In some cases calling for a trial of facts a court may also reasonably find that the prisoner’s presence is not necessary to a fair hearing. The provision that the court is not required to have the prisoner produced covers such situations, and that was almost certainly its pur-

\* Thus a motion might allege that the testimony of A, B, and C, not including the prisoner, would show that the district attorney had knowingly relied on false testimony. If the prisoner had no personal knowledge of the matter and was properly represented by counsel who could produce A, B, and C as witnesses, the prisoner’s presence would not seem necessary to a fair hearing.

pose. It can hardly be read as meaning that even when the prisoner's presence is necessary to a fair hearing, the motion court can not require his presence but must proceed without him. Such a construction would permit that provision, inserted by the Revisers in the bill without comment, to nullify, as to cases involving disputed issues of fact not determinable on the record, the fundamental provision for a hearing contained in every draft of the section. And it was such cases that the Judicial Conference had particularly in mind. See pp. 4-5 *supra*. In many such cases the prisoner's presence as a witness or for purposes of preparation might be indispensable in order to make the hearing fair.

1. *A prisoner confined without the district may be produced when his presence is necessary to a fair trial.*

Respondent's principal contention is that the prisoner cannot be produced, even when his presence is necessary to a fair trial, when he is confined without the district. That point has been covered in our main Brief, pp. 32-44, 52-58, and only a few additional observations seem necessary.

a. Respondent has noted that a provision for nation-wide process was included in one of the bills submitted to Congress by the Judicial Conference (H. R. 6723, 79th Cong., 2d Sess., Resp. Br., pp. 51-52, Government's Brief, Appendix, pp. 181-182), but was subsequently omitted.

Since neither the provision nor its omission are referred to at any stage of the history of the legislation, the reason for its elimination is, of course, entirely conjectural. The provision may well have been deemed unnecessary in view of what we think it fair to say has been the general understanding of judges (apart from the majority below) that writs of *habeas corpus ad testificandum* and *ad prosequendum* would run to a prisoner outside the district. Certainly the assumption of the Judicial Conference, as expressed in Judge Stone's memorandum<sup>1</sup> and elsewhere, was that the prisoner could be produced, for otherwise there would have been no point to the extended discussion of the comparative disadvantages of transporting the prisoner in one direction or the court officials in the other. (See pp. 5-7, *supra*.) Since no such provision was contained in any of the other drafts submitted by the Judicial Conference or in the bill as enacted, it seems clear that the omission of the provision cannot be regarded as a manifestation of intention contrary to the expressed understanding of the Conference.

b. We have shown that *Ahrens v. Clark*, 335 U. S. 188, is inapplicable to writs issued as ancillary process in cases in which the court already has jurisdiction (Government's main Brief, pp.

<sup>1</sup> That memorandum was addressed to S. 1451 and S. 1452 (see Appendix, p. 126), the bills originally submitted by the Conference in 1944 (see Government's main brief, p. 19; Appendix, pp. 115-120).

89-41). Respondent counters with habeas corpus cases held moot because the prisoner and custodian are no longer within the district. *United States ex rel. Innes v. Crystal*, 319 U. S. 755; cf. *Ex parte Endo*, 323 U. S. 283, 304-307. But in the absence of such persons the court no longer has the power over any defendant which is essential to the entry of a judgment in a habeas corpus case, and accordingly has no jurisdiction in the case at all. Here the court issuing a writ *ad testificandum* or *ad prosequendum* has unquestioned jurisdiction over the main proceeding before it, and over both parties, the United States and the prisoner, who is confined pursuant to the court's judgment, and Section 2255 itself gives the court power to enter a judgment binding upon the parties whether or not any of them are within the district. The writs *ad testificandum* and *ad prosequendum* are therefore available as auxiliary or ancillary writs in a case over which the court retains jurisdiction.

c. Respondent also argues (Br., pp. 24-26) that if the presence of the prisoner is dependent upon the discretion of the Government or of the motion court, the procedure gives the prisoner an inadequate remedy. We have not asserted that the prisoner's remedy is adequate because the Department of Justice as a matter of grace may be willing to produce him, but because the court has power to issue a writ for the production of the prisoner when necessary to give the prisoner

a fair hearing. Apart from its practical importance in showing that the prisoner's presence can, in fact, be secured, the practice of the Department in invariably honoring writs *ad testificandum* and *ad prosequendum* for the production of prisoners confined outside the District is a relevant factor in determining the construction of the all-writs statute. The consistent and uniform interpretation of a statute by an affected executive agency—even one not charged with its administration—is entitled to some weight, particularly, or at least, when such a construction may be thought to be adverse to the agency's specialized interest in protecting the public safety by maintaining prisoners in custody.

It is urged that since the motion court exercises a discretionary authority in ordering the production of the prisoner, the remedy must be deemed inadequate. But as the Tenth Circuit sitting *en banc* declared in *Barrett v. Hunter*, 180 F. 2d 510, 514, quoted in our main Brief at pages 53-54, the motion court does not act at large; it must exercise a sound judicial discretion. And the test, as we have seen (pp. 9-10 *supra*), is whether the prisoner's presence is necessary to a fair hearing—certainly not a standard which courts should be unable to administer. Any uncertainty as to what is required under the motion, as a result of its newness and the absence of any authoritative pronouncement by this Court, may well

disappear after this Court's decision in this case. In view of the fact that many courts have caused the prisoner to be produced, the remedy cannot be characterized as necessarily inadequate.

It is true that, as in this case, a district court may erroneously proceed in the prisoner's absence, and that correction of the error by appeal will take time. But all litigation, habeas corpus included, is subject to that kind of risk. In so far as this respondent is concerned, his case will not be speeded up nor aided in any other way by requiring him to proceed by writ in San Francisco rather than by motion in Los Angeles, where he asked to be heard.

2. The motion procedure does not deprive the prisoner of his right to a speedy determination.

Respondent asserts (Br. 40-41) that the motion remedy deprives a prisoner of the speedy determination of his rights obtainable at habeas corpus. In our main brief (p. 58) we have stated that the requirement of a "prompt hearing" in Section 2255 is a sufficient substitute for the time schedule prescribed for habeas corpus cases in Section 2243. That section provides that the return to the writ shall be submitted "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The rules of a number of district courts require that answers to motions

be filed within five days; \* since the answer to the motion is equivalent to the return to the writ, it can be seen that the time schedule in this respect will not be substantially different. Section 2243 also provides "when the writ or order is returned a day shall be set for hearing, not more than five days after the return *unless for good cause additional time is allowed.*" The italicized clause shows that the time schedule for a habeas corpus hearing is sufficiently flexible so as not, in substance, to differ from the requirement for a "prompt hearing" contained in Section 2255.

Federal judges are doubtless aware that the motion under Section 2255 is a substitute for the Great Writ, and that a person's liberty may depend upon the prompt disposition required by the statute. It should be assumed that they will accord prisoners speedy relief under the motion unless some insuperable obstacle thereto clearly appears.

\* E. g. Rules of the United States District Courts: Southern District of California, Rule 3 (d); District of Columbia, Rule 9; Eastern District of Missouri, Rule 8; see Northern District of California, Rule 3, and Northern District of Illinois, Rule 6.

The reference in respondent's brief to the time which it has taken respondent to secure an adequate hearing seemingly attributes the delay to the inadequacy of the motion procedure. But it should be noted that the final order of the district court was entered less than a month after the filing of respondent's motion (R. 1, 13), and that the notice of appeal was filed two weeks later (R. 17). The first decision of the court of appeals was handed down sixteen months later (R. 22). This delay is hardly the fault of the motion procedure prescribed in Section 2255.

The exceedingly helpful though admittedly incomplete statistical data<sup>10</sup> furnished to counsel by the Administrative Office of the United States Courts do not reveal any major discrepancy in the speed with which writs and motions are disposed of. The statistics show that for all writs the median time before termination of the proceeding in the district court was .9 months for 1948-1949, 1.1 months for 1949-1950, and ~~4~~<sup>10a</sup> months for 1950-1951, whereas the corresponding time for motions was 1.6, .8, and 1.1 months for the same years. For cases terminated after trial, the median time for writs was 1.6, 1.6, and 1.4 months for the three years respectively; for motions the incomplete data showed that one-half of the 12 cases listed were disposed of in less than two months. With respect to both writs and motions, there were cases which were not disposed of promptly; over the three-year period, 37 habeas corpus cases (2.7%) were not terminated within twelve months, whereas the same was true of apparently 7 (2.5%) of the much smaller number of motions. These figures prove only that there is no basis for assuming or holding that the motion procedure will be so much slower than habeas corpus as to warrant holding it an inadequate substitute.

<sup>10</sup> These figures which are, of course, available to the Court, bring up to date and amplify the data in Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio State L. J. 337 (1949), cited in *Darr v. Burford*, 339 U. S. 200, 233 (dissent).

<sup>10a</sup> It may be surmised that the sudden decrease in the time required for habeas corpus cases may be due to the dismissals for failure to follow the procedure prescribed by Section 2255.

### *3. Provisions as to bail*

Respondent argues (Br., p. 41) that the motion procedure is inadequate because there is no provision for bail on appeal similar to that for habeas corpus under Supreme Court Rule 45. Under the Rule a prisoner refused a writ shall not be granted bail, while a prisoner discharged may be released in recognizance, with or without surety, pending appeal (Rule 45 (1) and (3)). The same would doubtless be true on a motion, despite the lack of a specific rule to that effect. Rule 45 (2) provides that where a writ of habeas corpus issues but has been discharged, the prisoner may be remanded to custody or released on bail. The absence of a similar provision for a prisoner denied relief under a motion hardly makes the procedure legally inadequate.

### *4. Privileges in *forma pauperis**

Respondent argues (Br., p. 41) that fees for transcripts are paid by the United States for persons proceeding *in forma pauperis* in "criminal or habeas corpus proceedings" under Section 753 (f); 28 U. S. C., but that there is no such provision for persons proceeding under Section 2255. We think it probable that the motion would be regarded as a "criminal" proceeding for purposes of Section 753 (f), if that were necessary. But Section 1915 (b) provides that:

In any civil or criminal case the court may, upon the filing of a like affidavit, di-

rect that the expense of furnishing a stenographic transcript and printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

This section clearly permits the obtaining of records *in forma pauperis* in all types of cases. Certainly it cannot be assumed that the courts or the Administrative Office will make a distinction between persons proceeding under Section 2255 and persons seeking the same relief by way of habeas corpus in so far as obtaining transcripts or other documents at Government expense is concerned.

#### 5. *The writ and the motion do not differ in respect to their finality*

It is objected that Section 2255 establishes stricter standards of finality than apply to habeas corpus under Section 2244. While not denying that neither section makes a ruling *res judicata* (see Government's main Brief, pp. 84-85), respondent relies on the fact that while both sections declare that the court "shall not be required" to entertain a second petition for similar relief, only Section 2244 contains the clause conditioning denial on a finding that "the judge or court is satisfied that the ends of justice will not be served by such inquiry." The absence of

such a provision in Section 2255 does not mean that the courts will apply a more rigid standard; in the absence of any statutory limitation, the quoted clause would seem to set forth the standard which they would be expected to apply. Section 2244 may have been made more specific in this respect because the Reviser's bill contained a mandatory provision embodying the principles of *res judicata*. See S. Rep. 1559, 80th Cong., 2d Sess., p. 9. The section was objected to by the Conference because of that provision (*id*; Appendix, pp. 154-159, 183-184), and accordingly was rewritten by the Senate Committee in accordance with the Conference's recommendations. S. Rep. 1559, *supra*. The corresponding provision in Section 2255, which did not establish the doctrine of *res judicata*, but merely made applicable the principle of *Salinger v. Loisel*, 265 U. S. 224, was inserted by the Revisers without comment and accepted without objection by the Conference.

We do not mean to suggest that a remedy by motion would be legally inadequate or ineffective or unconstitutional if it were governed by the principle of *res. judicata*. The contrary seems clearly true: See *Barrett v. Hunter*, 180 F. 2d 510, at 516 (C. A. 10). Historically, habeas corpus decisions were not appealable and there was good reason for not making the decision of a single judge absolutely binding. Now that habeas corpus decisions are subject to "the cleansing bath of appellate review," there is certainly no

fundamental reason—at least none of constitutional stature—for adherence to the ancient doctrine,<sup>11</sup> even though there may be considerations of policy which support a less restrictive rule such as has been approved by this Court (*Salinger v. Loisel*, 265 U. S. 224) and by the Judicial Conference and Congress in Sections 2244 and 2255.

## II

### The constitutionality of section 2255

The Government's main brief asserted that at the time the Constitution was adopted, and up until the Act of 1867, habeas corpus was not available as a remedy after conviction, once the jurisdiction of the court over criminal matters—which means, of course, over the kind of case in issue—was shown; we had thought that so axiomatic that the mere citation of leading cases was sufficient to establish it (Government Br., p. 75). This limitation upon the historical scope of the writ suggested that, even if Section 2255 be regarded as a curtailment of the right to the writ as expanded by the 1867 statute—which it was not intended to be, and which for reasons already set forth we think it clearly is not—it would not be a contraction of the writ protected by the Constitution. Respondent seems to challenge the universal assumption as to the historical limitation upon the

<sup>11</sup> See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657, 669-670 (1948).

writ as applied to convicted criminals, largely upon the basis of a "misplaced parenthesis" (Resp. Br., p. 31) in the Government's version of the Habeas Corpus Act of 1679.

Although the historical approach, which we confess to having interjected into the case, has its fascinations, it must be examined in proper perspective. It is our position that Section 2255 is an appropriate and reasonable exercise of the power of Congress to regulate habeas corpus procedure—a power which necessarily includes authority to modify that procedure in substantial respects so long as the essential protection accorded by the Great Writ is not impaired. For reasons already stated (pp. 9-20, *supra*), we believe that Section 2255 does not in any way deprive the prisoner of rights previously accorded him by way of habeas corpus, even if it be regarded as a complete substitute for the writ. And, in any event, since the writ remains available whenever the motion procedure proves an inadequate or ineffective remedy, Section 2255 does not constitute a suspension of the writ even if it were regarded as granting the prisoner substantially less protection.

Our reliance upon history was to show that if all of the above arguments are found wanting, and if Section 2255 were held to provide a less effective remedy than does the present statutory writ of habeas corpus, it would, nevertheless, be

plainly constitutional, since it provides greater protection than the writ of habeas corpus known to the common law, known to England, known to the framers of the Constitution, and known to this Court prior to the statutory enlargement of 1867. The premise of this argument is that the historical writ was not available to prisoners convicted by courts of competent jurisdiction.

A. The cases in this Court

Although this Court will doubtless be anxious to know who misplaced the parenthesis in the Act of 1679, it will probably and properly be guided to a considerably greater extent by its own uniform line of decisions as to the original scope of habeas corpus available to convicted prisoners. Accordingly, before embarking on the historical excursion, we shall call attention somewhat more elaborately than in our main brief to what this Court has said.

Perhaps the most recent summary of the prior law is contained in *Frank v. Mangum*, 237 U. S. 309, 330, wherein this Court said:

The rule at the common law, and under the act 31 Car. II, c. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III, c. 100, § 3), seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held,

under the judiciary act of 1789 (ch. 20, § 14, 1 Stat. 73, 81), in *Ex parte Watkins*, 3 Pet. 193, 202. And the rule seems to have been the same under the act of March 2, 1833 (ch. 57, § 7, 4 Stat. 632, 634), and that of Aug. 29, 1842 (ch. 257, 5 Stat. 539).

In *Ex parte Watkins*, 3 Pet. 193, one of the leading early cases, the Court stated, speaking through Chief Justice Marshall (p. 202):

\* \* \* \* the celebrated *habeas corpus* act of the 31 Car. II. was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to, as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habeas corpus*?

In *Ex parte Yerger*, 8 Wall. 85, 101, the Court stated:

As limited by the act of 1789, it [habeas corpus] did not extend to cases of impris-

onment after conviction, under sentences of competent tribunals; \* \* \*

Again in *Ex parte Parks*, 93 U. S. 18, 21-23, after referring to a number of English authorities, the Court stated (p. 22):

These extracts are sufficient to show, that, when a person is convict or in execu-  
tion by legal process issued by a court of  
competent jurisdiction, no relief can be  
had. Of course, a superior court will in-  
terfere if the inferior court had exceeded  
its jurisdiction, or was not competent to  
act.

In *Ex parte Siebold*, 100 U. S. 371, 375-6, cited by respondent, the Court stated that (p. 375):

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

And *Ex parte Yarbrough*, 110 U. S. 651, states with respect to the use of the writ for convicted prisoners (pp. 653-654):

\* \* \* if that court had jurisdiction of the party and of the offence for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.

Other cases stating the general rule are cited in the note below.<sup>12</sup>

The English cases cited by respondent (p. 34) cannot be said to stand for any broader proposition. A number of cases describe the English law as permitting *habeas corpus* after conviction only to test the jurisdiction of the trial court, *Rex v. Lewes Prison (Governor)*, 1917, 2 K. B. 254; *King v. Suddis*, 1 East 306 (1801); *King v. Taylor*, 7 Dow. & Ry., 622 (1826). As in the United States, in some cases "jurisdiction" seems to be construed narrowly (*In the Matter of Newton*, 16 C. B. (7 J. Scoft) 96 (1853); *Ex parte Lees*, El. B. & E. 828 (1858)) and in others broadly (*Souden's Case*, 4 B. & Ald. 294 (1821)). *Bushell's Case*, Vaughan 135, 6 St. Tr. 231 (1670) can be classified as one in which jurisdiction was lacking because there was no such offense, thus rendering the proceeding void. *In re Authors*, 22 Q. B. D. 345 (1889), was a case in which the sentence was beyond the jurisdiction of the sentencing court.

The enlargement of the concept of jurisdiction in recent years has found statutory basis in the language of the Act of 1867 (see Government's

<sup>12</sup> *Johnson v. Zerbst*, 314 U. S. 458, 466; *Ex parte Kearney*, 7 Wheat. 38, 42-43; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Rowland*, 104 U. S. 604, 612; *Ex parte Mason*, 105 U. S. 696, 697; *Ex parte Curtis*, 106 U. S. 371, 375; *Ex parte Wilson*, 114 U. S. 417, 420-421; *Ex parte Harding*, 120 U. S. 782, 783-784; *In re Schneider (No. 2)*, 148 U. S. 162, 166.

main brief, pp. 76-79), although it is true that many of the cases do not refer to the statute. But in none of the early cases would this Court permit a challenge to a conviction by a court acting within its jurisdiction on the basis of facts dehors the record. See also the statement of the Committee of the Judicial Conference (Appendix, p. 88).

**B. The act of 1679 and the possibly misplaced parenthesis**

The argument in our main brief that convictions in criminal cases could not be set aside on habeas corpus rested in part on the exception for convicts in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, which seems to have been generally recognized as the foundation upon which rests both the English and American law of habeas corpus with respect to criminal matters.<sup>13</sup> Respondent has asserted, however (Br. pp. 30-32), that that exception merely left convicted prisoners to the common law of habeas corpus without the benefit of any of the rights accorded by the 1679 statute. Examination of the authoritative commentators upon the meaning and effect of the 1679 Act discloses that, although they did not advert to the precise question, they all treated the Act as codifying the entire law of habeas corpus in so far as it related to "criminal or sup-

<sup>13</sup> See *Frank, Watkins, and Parks*, cases quoted at pp. 23-25, *supra*, and authorities cited at pp. 28 and 32, *infra*.

posed criminal matters",<sup>14</sup> a phrase frequently used in the statute itself to show what it intended to cover. See Sections I, II, IX. These commentators nowhere imply that the Act left such an important problem as the rights of convicted prisoners "to the vagaries of the common law procedure".<sup>15</sup>

It is true, however, that the American and English cases referred to above, holding that where there is lack of jurisdiction habeas corpus may be available to convicted prisoners, do seem to go beyond the rights granted by the 1679 Act. But they do not hold or suggest—prior to the 1867 Act of Congress—that a conviction may be set aside for violation of procedural rights in the course of the trial or that evidence dehors the record may be taken to determine whether any such violation occurred. Since the writ guaranteed by the Constitution afforded much less protection than Section 2255, the latter can hardly be deemed an unconstitutional suspension.

<sup>14</sup> Wilmott's Notes of Opinions and Judgments, *Opinion on the Writ of Habeas Corpus* (1758), 77-129, see especially 85-86, 89, 105; 9 Holdsworth, *History of English Law* (1926), 110-125; Dicey, *Law of the Constitution* (1939), pp. 216-219. Hurd, *Habeas Corpus* (2d ed., 1876) 199, states:

"The common law writ of habeas corpus, as has been observed, was not taken away by the act of 31 Car. II; but was left wholly untouched by it in all cases where the detainer was not for criminal or supposed criminal matter."

<sup>15</sup> "The effect was to leave what may be termed *civil detentions* to the vagaries of the common law procedure." Cohen, *Habeas Corpus Cum Castra*, 18 Can. Bar. Rev. 172, 186 (1940).

Although the point seems to us to be of no importance, we think it appropriate to comment on respondent's suggestion that in construing the 1679 Act we were misled by a "misplaced parenthesis". Section III of the 1679 Act permits persons "committed or detained" for any crime "other than persons convict or in execution by legal process or any one on his or their behalf" (parentheses omitted, italics supplied) to apply for writs of habeas corpus. Respondent places parentheses around the italicized words alone, whereas the Government's brief also included the following phrase "by legal process". But whether that phrase modifies "committed or detained" or "persons convict or in execution", the statute clearly exempts persons convicted of crime from its provisions. We do not think the placement of the parenthesis proves anything one way or the other as to whether such persons remained entitled to a broader common law writ. Unquestionably, the 1679 Act applied only to persons *committed* "by legal process" for it was concerned only with criminal or supposed criminal matters, and not with private restraints. The reference to persons "convict or in execution" also obviously covers persons convicted "by legal process"; by which clearly was meant not persons convicted legally but convicted by the process of law. Thus, there would be no difference in meaning wherever the parenthesis be placed. In any event, the English did not take their parentheses that seriously; indeed, it has been stated

by reputable authorities that "the words as they stand in the Rolls of Parliament are never punctuated".<sup>16</sup>

Nevertheless, respondent believes that the placement of the closing parenthesis has some significance, and respondent asserts that there has been "a curious misreading of the Act by early state legislators in this country, shared by certain commentators and the Government in the present case" (Br. p. 31):

Respondent relies upon the *Statutes of the Realm*, the pertinent volume of which was first pub-

<sup>16</sup> Hardcastle, *A Treatise on the Construction and Effect of Statutory Law* (London, 1879), p. 26. See also *Barrow v. Wadkin*, 24 Beav. 327, 330: "I supposed I should not learn much on the subject from the inspection of the Roll of Parliament; but, as it was in my custody, I have examined it, \* \* \* It seems that in the Rolls of Parliament the words are never punctuated, and accordingly very little is to be learnt from this document" (Romilly, M. R.). *Doe v. Martin*, 4 D. & E. 39, 65-70 (1790): "We know that no stops are ever inserted in acts of parliament." *Duke of Devonshire v. O'Connor*, 24 Q. B. D. 468, 478 (1890): "To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops." *Rex v. Casement*, 1917, 1 K. B. 98, 123: "Now I repeat what I said during the argument, that we must construe these words of this statute; now some 560 years old, without reference to commas or brackets, but merely looking to the language." 2 Sutherland, *Statutory Construction* (3d ed., 1943), pp. 476-7: "Parliamentary enactments originally were not punctuated and thus it was a necessary conclusion that the punctuation subsequently inserted was no part of the act." See also 31 *Halsbury's Laws of England* (2d ed., 1938), p. 465.

lished in 1819, as containing the authentic text of the Act of 1679. This edition of the English statutes, which puts the closing parenthesis *before* "by legal process", as respondent asserts, is regarded as official and authoritative, and its version of the 1679 Act has been followed in subsequent compilations of English laws.<sup>17</sup> Prior to this edition, however, "no authoritative edition of the statutes was obtainable".<sup>18</sup> Of the nine earlier editions of the English statutes printed between 1679 and 1819 found in the Library of Congress, seven (including the only two contained in the libraries of this Court and of the Department of Justice) placed the paren-

<sup>17</sup> E. g., 6 Hals. *Statutes of England*, 86 (2d Ed. 1948); 1 *The Statutes*, 413 (3d Rev. Ed. 1950); 5 *The Complete Statutes of England*, 84 (1929). With respect to the accuracy of the *Statutes of the Realm*, see Winfield, *The Chief Sources of English Legal History* (1925), 92, as follows:

That, on the whole, the work was done well, is undeniable. That it should have been perfect no reasonable human being could expect. That it might have been much better than it actually was, without making impossible demands on the editors, is an unfortunate fact. Perhaps the early twentieth century plumes self too much on meticulous accuracy in small fields of research to sympathize with the partial success of the early nineteenth century in far wider regions. At any rate, every word of *Statutes of the Realm* cannot be taken as canonical. The Commissioners made mistakes in transcription, they blundered badly occasionally in translation, their dates are not always accurate, their evaluation of sources leaves something to be desired, and such as it is, they do not consistently adhere to it.

<sup>18</sup> *Id.*, at 90.

thesis after "by legal process" rather than before.<sup>19</sup> The "certain commentators" who shaped the Government's misapprehension as to the placement of the parenthesis include not only this Court (*Ex parte Parks*, 93 U. S. 18, 21),<sup>20</sup> but many authoritative works on the subject (3 Blackstone *Comm.* 136 (1803 ed.); 4 Bacon's *Abridgment of the Law* 577 (1852 ed.); 2 Hawkins, *Pleas of the Crown*, 145 (6th ed. 1787); 9 Holdsworth, *A History of English Law* 118 (1926); Church, *Habeas Corpus* 50 (2d ed. 1893); Hurd, *Habeas Corpus* 640 (2d ed. 1876); Cohen, *Habeas Corpus Cum Causa*, 18 Can. B. Rev. 172, 187 (1940)), and the legislatures in 12 states which have laws modeled on the Act of 1679 (Del. Laws (1797 ed.), c. IV. Md. Laws (1811 ed.), c. 125; Mass. Laws, 1784, c. 72; Mich. Rev. Laws 1827, p. 215; N. J. Laws 1795, c. d. (1797 ed.) xxxvi; N. H. Laws 1815, c. 45; N. Y. Laws

<sup>19</sup> Parenthesis before: rare edition of the Act, apparently printed in 1679, in Library of Congress compilation of separate laws (now in Miss Newman's office), and 2 *Statutes at Large* 1489 (Keble 1695). Parenthesis after: 2 Cay's *Statutes at Large* 856 (1758); 3 *Statutes at Large* 398 (Basket, printer 1763); 8 *Statutes at Large* 433 (Pickering ed. 1763); 3 *Statutes at Large* 398 (Ruffthead ed. 1770); 3 *Statutes at Large* 375 (Eyre, printer 1786); 3 *Statutes at Large* 233 (Raithby ed. 1811); 5 *Statutes at Large* 459 (Raithby reprint 1811). Pickering and Tomlins & Raithby have been described as "the favourite editions". Carswell, *Guide to Law Reports and Statutes* (2d ed., London, 1948).

<sup>20</sup> "The Habeas Corpus Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., Hab. Corp. B." 93 U. S. at 21.

1787, c. 39; id. 1801, c. 65; id. 1818, c. 277; N. C. Rev. Stats. 1837, c. 55; Ohio Laws 1831, p. 164; R. I. Rev. Stats. 1857, c. 201; 1 S. C. Stats. at Large (1837 ed.), p. 117; 2 *id.*, p. 401; Virg. Comp. Laws 1776-1807, c. 118).

In this case, the punctuation of the British statute is relevant only by reason of its effect upon the understanding of "habeas corpus" when the Constitution of the United States was adopted. Unquestionably, during the entire 18th Century and for some time thereafter it was assumed both by English and American authorities that the parenthesis came after the phrase "by legal process". If there be any difference in legal effect, which we doubt, the version of the British Act familiar to the framers of the Constitution must control.

Respectfully submitted.

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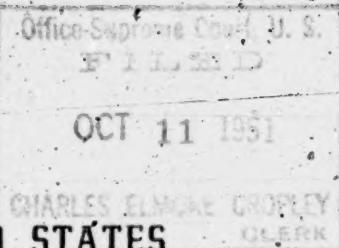
OCTOBER 1951.

## ADDENDUM TO APPENDIX II

Since the filing of the Government's main brief, responses to the questionnaire have been received from six additional United States Attorneys. Three recited that they had no cases under Section 2255, and one that the only case raised a question of law, which was determined by the court in favor of the prisoner without his being present. The replies from the District of New Jersey and the Middle District of Tennessee stated that in each district prisoners had been produced from outside the district through the use of the writ of habeas corpus *ad testificandum*. The letter from the United States Attorney for the Middle District of Tennessee states:

In cases in our District in which a motion under Section 2255 raises issues of fact which cannot be conclusively resolved from the files and records of the case, it has been customary to resolve these issues with testimony in Open Court, the prisoner having a right to be present as a witness and otherwise. Counsel is always appointed for the petitioner in the event he is unable to employ counsel of his choice. Petitioner is always brought before the Court on a writ of habeas corpus *ad testificandum*, which is dated a few days prior to the date of hearing in order to give the prisoner adequate opportunity to consult with counsel. In the event either the attorney or the prisoner makes allegations as to inadequacy of time for preparation, the matter is passed a few days in order to give counsel and prisoner time to confer and prepare.

LIBRARY  
SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

—  
No. 23  
—

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

HERMAN HAYMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

—  
BRIEF FOR THE RESPONDENT  
—

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 23

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

HERMAN HAYMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below

The opinions in the Court of Appeals on the original hearing (R. 22-43) and on the Government's petition for rehearing (R. 46-51) are reported at 187 F. 2d 456.

Jurisdiction

The judgment of the Court of Appeals was rendered on October 27, 1950 (R. 44) and rehearing was denied on February 26, 1951 (R. 45). The petition for certiorari was filed on March 28, 1951 and was granted on May 14, 1951 (R. 52). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

### Questions Presented

1. Whether a motion in the sentencing court under section 2255 of Title 28, which substitutes such a motion for habeas corpus to attack the validity of a federal conviction, is inapplicable in the present case, or "inadequate or ineffective to test the legality of [the prisoner's] detention", entitling respondent under the terms of the section to pursue the remedy of habeas corpus.
2. Whether the motion procedure prescribed by section 2255 so departs from the essential guarantees of habeas corpus that it constitutes a suspension of the privilege of the writ in violation of the Constitution.

### Constitutional Provision and Statute Involved

The provisions of Article I, section 9, clause 2, of the Constitution and section 2255 of the Judicial Code will be found in Appendix A; *infra*, pp. 46-47.

The evolution of the text of section 2255 is indicated by provisions of antecedent bills printed in Appendix B, *infra* pp. 47-53.

### Statement

The present proceeding was begun on May 11, 1949, when respondent filed in the District Court for the Southern District of California a motion to vacate judgment and sentence and for a new trial (R. 1-4). The motion prayed for an oral hearing and for an order directing the warden of the Federal Penitentiary at McNeil Island, Washington, to have the body of respondent in the court at the time of hearing (R. 4).

The judgment of conviction attacked by the motion had been entered in the same court on January 20, 1947, under a six-count indictment for forging endorsements on government checks and impersonating the payees (R. 2, 8-9). The

ground of the motion now relevant was that respondent was deprived of the effective assistance of counsel, in that without respondent's knowledge his counsel was also attorney for one Juanita Jackson, a principal witness against him and a defendant in a related case (R. 3). The court's records showed that this witness's testimony at respondent's trial was given between the time of a plea of guilty by her and her subsequent sentence (R. 9, 1f). The conviction of respondent was affirmed by the Court of Appeals without opinion; the want of effective assistance of counsel was not in issue on that appeal (R. 10).

The motion to vacate judgment was heard by the district judge without ordering the production of respondent and indeed without giving notice to him (R. 8, 24). After taking the testimony of respondent's former counsel and the United States Attorney,<sup>1</sup> the court made findings of fact and conclusions of law and denied respondent's motion on June 9, 1949 (R. 24; 8, 13). On June 23, 1949, respondent filed a notice of appeal in the Court of Appeals (R. 17).<sup>2</sup> During the pendency of the appeal respondent was transferred from McNeil Island to Alcatraz.

The Court of Appeals reversed the order of the District Court, holding that respondent's motion should be dismissed in order that he might file a petition for habeas corpus in the district of his confinement (now the Northern District of California) (R. 44). The construction and validity of section 2255 of the Judicial Code, prescribing the motion procedure, were considered by the court on its own motion. Judge Denman was of opinion that where, as here,

<sup>1</sup> The testimony in the District Court was not transcribed for the record on appeal and is not now before the Court.

<sup>2</sup> The appeal was timely if governed by the Civil, not the Criminal Rules. For the reasons stated in *Mercado v. United States*, 183 F. 2d 486 (C. A. 1), the Civil Rules should be held to apply to appeals under section 2255 of the Judicial Code.

an issue of fact is presented and the prisoner is confined outside the district of the sentencing court, the motion procedure is "inadequate or ineffective" to test the legality of the prisoner's detention under the terms of section 2255 itself (R. 22-36). Judge Stephens, concurring in the result, placed his opinion on the invalidity of section 2255 as a suspension of the privilege of the writ of habeas corpus (R. 36-39). Judge Pope, dissenting, thought that the judgment below should be affirmed (R. 39-43). The Government petitioned for rehearing. In denying the petition, Judges Denman and Stephens each expressed concurrence in the grounds taken by the other (R. 46-49). Judge Pope again dissented (R. 50-51).

### Summary of Argument

1. The motion procedure in the sentencing court prescribed by section 2255 is a substitute for habeas corpus, not a mere prerequisite. The procedure, however, is inapplicable by its terms if it is "inadequate or ineffective to test the legality" of the prisoner's detention. Its adequacy must be judged by standards appropriate to a substitute for the Great Writ.

The procedure was designed on the model of *coram nobis* or a motion for a new trial, and it was assumed that the prisoner had no right to be present at the hearing as on habeas corpus. If, as the Government now suggests, the procedure should approximate that on habeas corpus, it cannot be applied in cases of factual disputes consistently with the design of the section. To bring in prisoners from distant points as a matter of right would subvert the statutory scheme. The statute does not require the prisoner's presence as on habeas corpus; it provides that he need not be produced. It makes no provision for process to bring him in; a provision for nationwide process in an antecedent version of the statute was omitted.

The practice under the section confirms the conclusion that it is not designed to conform to habeas corpus standards. Relatively few prisoners have been produced in comparison with the practice on habeas corpus. The pattern of non-production is not significant where only issues of law are raised by the movant's papers; it is of great moment where, as here, the prisoner ought to be produced if the remedy is to be adequate. In such cases the presuppositions of the scheme are untenable and it becomes inapplicable.

The motion procedure is not only inapplicable but would be inadequate, since process extending outside the district of the sentencing court is not authorized by the habeas corpus legislation, the "all writs" section, or section 2255 itself. A concession on rehearing in the Court of Appeals that respondent is entitled to be present at the hearing came too late to make the remedy adequate. In any event, the right to be present cannot be made to depend on the discretion of the Government or of the sentencing court.

2. If the motion procedure is held to be applicable in the case at bar, it would constitute a suspension of the privilege of habeas corpus in violation of the Constitution. It is not true that the writ was unavailable at common law to persons convicted by courts of general criminal jurisdiction. The misconception is dual: that the English Act of 1679 was coextensive with the common-law writ and that it made such an exclusion. The latter misconception may stem from an erroneous reading of the punctuation in the Act; in any event, the provisions in question dealt with bail for untried prisoners and left convicted persons wholly to the common-law writ, under which most applications for habeas corpus are brought in England. Nor does the power to make a factual inquiry depend on statutory grant. The basis for a factual inquiry is particularly strong where the prisoner is not being held for trial and where consequently there would be no anticipation of the function of a jury.

Our own Act of 1867 is not the source of the authority to examine into the constitutional validity of a Federal trial on habeas corpus. In *Ex parte Siebold*, 100 U. S. 371, reviewing the constitutionality of a Federal criminal statute on habeas corpus, Mr. Justice Bradley referred not to the Act of 1867 but to Bacon's Abridgment, Chief Baron Gilbert, and Chief Justice Vaughan's venerated opinion in Bushell's Case. The writ is available, without the aid of statute, wherever a man is restrained of his liberty for a cause for which no man ought to be imprisoned or by a process whereby no man ought to be convicted.

The motion procedure, in its cumulative effect, destroys the vitals of habeas corpus: prompt and peremptory production of the prisoner where a disputed issue of fact is raised; opportunity for bail on appeal after discharge of the writ or of the prisoner; opportunity to make a successive application to another judge or court in an effort to arrive at the truth.

The abuses of irresponsible petitions are met by procedural provisions outside of section 2255. That section tends rather to encourage dishonest applications by holding out the premium of a more extended journey from prison if the prisoner's allegations are sufficiently impressive. To invalidate the section would not produce untoward results but would, instead, give reassurance that when faced with an erosion of the liberty of the citizen the Court will set up the bulwark of *obsta principiis*.

## ARGUMENT

### I

#### The Remedy by Motion under Section 2255 Is Inapplicable in This Case.

This case presents important questions concerning the construction and validity of section 2255 of Title 28 of the

United States Code, *infra*, p. 46, added in the revision of 1948. The section provides for a motion in the sentencing court to vacate a criminal sentence or judgment at the instance of a prisoner convicted by a Federal court, on grounds that would render the judgment or sentence vulnerable to collateral attack. The most critical portion of the section is the final sentence:

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Respondent's motion in the sentencing court raised issues calling for his presence at a hearing, as the Government belatedly conceded on motion for rehearing in the Court of Appeals, eighteen months after the prisoner's motion was filed. On petition for a writ of habeas corpus, respondent would have had the undoubted right to be produced in court with the utmost expedition; the writ operates, to borrow Francis Thompson's refrain, with "deliberate speed, majestic instance." The Government insists that respondent must start again in the sentencing court. The court below held that the remedy by motion in the sentencing court under Section 2255 of the Judicial Code was, in the language of the final sentence of the section itself, "inadequate or ineffective to test the legality of his [respondent's] detention," and that consequently the appropriate remedy was habeas corpus in the district of imprisonment pursuant to the saving clause of section 2255. In so holding, we submit, the court was right. On this branch of the argument we are dealing only with a case, like that at bar, in which the factual issues raised by the application and response make

it necessary that the prisoner be present at a hearing, as on habeas corpus. If our position is sound, it will become unnecessary to consider the more pervasive constitutional difficulties raised by section 2255, discussed under Point II, *infra*.

**A. SECTION 2255 IS DESIGNED AS A SUBSTITUTE FOR, NOT A PREREQUISITE TO, HABEAS CORPUS; AND ITS STANDARD OF ADEQUACY OR EFFECTIVENESS MUST BE CONSTRUED ACCORDINGLY.**

In construing the final sentence, or saving clause, of section 2255 it is important to appreciate the relation between the motion procedure and the availability of habeas corpus. If the motion procedure is only a prerequisite to habeas corpus the adequacy or effectiveness of the former may be judged by one set of standards; if it is a substitute, precluding resort to habeas corpus, the test will be more exacting. At the last term the Court was able to avoid certain constitutional problems concerning military review of courts martial by noting that the supplemental proceedings in question merely preceded, and did not supplant, habeas corpus. *Gusik v. Schilder*, 340 U.S. 128. The Court, by way of analogy, referred to the rule of exhaustion of state remedies before resort to federal habeas corpus, now codified in section 2254 of the Judicial Code. Although the Government's brief referred also to section 2255 as an analogy the Court refrained from citing this section.

Other courts, as well as commentators, have been less careful, and their premise that the motion under Section 2255 leaves intact the later availability of habeas corpus could not fail to affect their conclusions regarding the adequacy and validity of the motion procedure. In *Martin v. Hiatt*, 174 F. 2d 350 (C. A. 5), the court remitted the prisoner to the motion procedure, stating (p. 352): "Then, if such a petitioner's effort were an ineffective test or if, he failed to succeed in the court that had cast the yoke upon

him, the right of appeal would still be his; and if either or both of these efforts should prove inadequate, then he should still have access to the great, age-old, and grossly abused writ of habeas corpus ad subjiciendum." The statute, the court concluded, provides that "an attack upon a final judgment of conviction by a Federal court in a criminal case ought usually to be made *first* in the court that rendered such judgment." (Italics added.) In *Weber v. Steele*, 185 F. 2d 799 (C. A. 8), another Court of Appeals took the same view (p. 800): "The purpose of Section 2255 was to require a federal prisoner to exhaust his remedies in the courts of the District and Circuit in which he was convicted and sentenced, and to apply to the Supreme Court, on certiorari from a denial of such remedies, before seeking release on habeas corpus. This means that he must exhaust all the ordinary remedies available to him before applying for an extraordinary remedy." Similarly, Judge Underwood has said: "The question here is, does Code Section 2255 place such restrictions upon the use of the writ as to amount to an unconstitutional suspension of it, or, are such restrictions merely permissible requirements of procedure which do not suspend but only temporarily delay its use for a reasonable time for a justified purpose? When properly construed, I think the latter alternative statement is the proper construction." *St. Clair v. Hiatt*, 83 F. S. 585 (N. D. Ga.). See also *Wong v. Vogel*, 80 F. S. 723 (E. D. Ky.); *Waldon v. United States*, 84 F. S. 449 (E. D. Ill.). Indeed, the chief draftsman of the revision of Title 28 appears to take the same view: "Probably the strongest argument for the constitutionality of the statute is found in the long line of cases holding that a prisoner before resorting to habeas corpus must exhaust all his other procedural remedies. The statute is a substitute for the writ of error *coram nobis*, not for the writ of habeas corpus. It clarifies and restates in simple terms the procedure for correcting an illegal sentence before

a writ of habeas corpus may be sought." Barron, in 4 *Fed. Pract. and Proc.* 311 (1951).

Such a reading of Section 2255, making it simply a prerequisite to habeas corpus, overlooks the controlling language of the final sentence. Habeas corpus is not to be entertained, not only when the prisoner has failed to apply for relief by motion in the sentencing court, but where "such court has denied him relief," unless, of course, the remedy by motion is "inadequate or ineffective to test the legality of his detention." If the remedy by motion is adequate as a test, though it prove unsuccessful, recourse to habeas corpus is absolutely precluded.

The legislative background of the section and its purpose are confirmatory of this reading of the text. The use of a motion procedure to challenge a criminal sentence or judgment is by no means an innovation of the 1948 revision of the Judicial Code. Where the portion of the sentence being served is valid, an attack on a portion claimed to be invalid has not been cognizable on habeas corpus, and the prisoner has been permitted to make the challenge, on issues of law, in the sentencing court. Cf. *McNally v. Hill*, 293 U. S. 131; *Holiday v. Johnston*, 313 U. S. 342. The Advisory Committee on Rules of Criminal Procedure proposed a motion, without time limit, for vacating sentence or judgment on the ground of constitutional infirmity in the conviction as well as of newly discovered evidence; but this proposal was not embodied in the Rules as promulgated. See Report of Advisory Committee, 1944, Rule 35; Second Preliminary Draft, Federal Rules of Criminal Procedure, 1944, Rule 35; cf. *id.*, Preliminary Draft, 1943, 256-57 (minority views). This proposal, however, stopped short of superseding habeas corpus by the motion.

At the same time the Judicial Conference addressed itself broadly to problems of practice in habeas corpus, under the impetus of an increased case load of applications for the

writ by federal prisoners, many of which were felt to be frivolous and repetitious. See *Dorsey v. Gill*, 148 F. 2d 857 (App. D. C.); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171. In 1942 a committee was appointed, composed of Judge Parker as chairman, and Judges Kimbrough Stone, Albert Lee Stephens, Vaught, Underwood and Wyzanski. See Report of Judicial Conference, 1942, p. 18; *id.* 1943, p. 22; *id.* 1944, p. 22; 1945, pp. 3, 28; 1946, p. 21; 1947, p. 17. In 1945 bills prepared by the committee and approved by the Judicial Conference were introduced in the Senate and House. H. R. 4232 and 4233, S. 1451 and 1452, 79th Cong. 1st sess. The first bill in each house dealt with procedure on habeas corpus; the second, the precursor of Section 2255, with jurisdiction in habeas corpus to review convictions by state and federal courts, respectively. See Appendix, *infra*, p. 47. It is clear that the motion procedure was designed as a substitute for habeas corpus under the language of these bills. In this respect no change was made in the bill introduced in 1946 which superseded the 1945 bill. H. R. 6723, 79th Cong., 2d sess., Appendix, *infra*, p. 50. Meanwhile the revision of the entire Judicial Code was in process, and there was consultation between the revisers, representatives of the Department of Justice, and representatives of the Judicial Conference. See Govt. Br. App., pp. 121-126. With some changes the proposals of the Conference bills were taken into the revision of the Code. See H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 52. Again the function of the motion as a substitute for habeas corpus is maintained, in the final sentence. Nowhere is there any indication of the weight to be given to a denial of the motion if it could be followed by a petition for habeas corpus. Indeed, it would have been extraordinary if the draftsmen, concerned with what appeared to be a mountain of habeas corpus petitions, had simply succeeded in piling Olympus on Ossa by affording

Federal prisoners an additional, preliminary, remedy in a distant court.

As a substitute, then, for the Great Writ, the motion procedure must be judged in its "adequacy" by standards appropriate to such a displacement. In this Court at this time it is unnecessary to elaborate the historic and cherished role of habeas corpus as the great vindicator of human liberty against restraint which is fundamentally unsupportable. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95. From Marshall's day to our own, statutes affecting habeas corpus have been construed with the utmost regard for the procedural rights of the prisoner. Implications will not be indulged which are restrictive of those rights. *Ex parte Ballman*, 4 Cr. 75; *Ex parte Yerger*, *supra*; *Walker v. Johnston*, 312 U. S. 275; *Holiday v. Johns' on*, 313 U. S. 342. See also *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *Servonitz v. State*, 133 Wis. 231; *Secretary of State for Home Affairs v. O'Brien* [1923] A. C. 603. In that spirit we turn to consider the "adequacy" of the remedy by motion in the case at bar.

**B. THE MOTION PROCEDURE WAS NOT DESIGNED TO APPLY WHERE THE PRISONER HAS A RIGHT TO BE PRESENT AS ON HABEAS CORPUS: THE PRACTICE UNDER SECTION 2255**

The Government's petition for certiorari, comparing the motion procedure with habeas corpus, states (p. 14): "Basically, only the forum in which the proceedings are brought is changed." We do not so read the statute, its genesis and purpose, or the practice under it.

Had the draftsmen of section 2255 and its antecedent versions meant simply to change the forum for habeas corpus, it would have been perfectly easy so to provide. The only reference to habeas corpus in the description of the procedure on the motion occurs in reference to appeals:

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." The draftsmen could have made a similar incorporation by reference had they been minded to adopt habeas corpus procedure.

Did the draftsmen make provision for the right of the prisoner to be brought in as on habeas corpus? They did not. Instead, they provided: "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." Did they provide process for producing the prisoner from a distant place of confinement? They did not. Instead, they omitted a provision that had been included in an antecedent bill, H. R. 6723, 79th Cong. 2d sess., Appendix, *infra*, p. 52; "The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States." The contrast between the procedure on the motion and on habeas corpus is reflected in the original draft of the section, as presented to the Judicial Conference by its committee. The saving clause provided that habeas corpus would not be available to a Federal prisoner authorized to invoke the motion procedure.

"unless it appears that it has not been or will not be practicable to have his right to discharge from custody determined on such motion *because of the necessity of his presence at the hearing, or for other reasons.*"  
(Report of the Judicial Conference, 1943, p. 24.)  
(Italics added.)

What, then, was the model on which the motion procedure was constructed? The answer is plain. The model was the writ of error *coram nobis* or the motion for a new trial. So states the Reviser's Note to section 2255:

"This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas

corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress."

So states the principal draftsman of the Revision:

"The statute is a substitute for the writ of error *coram nobis*, not for the writ of *habeas corpus*. It clarifies and restates in simple terms the procedure for correcting an illegal sentence before a writ of *habeas corpus* may be sought." (Barron, in *4 Fed. Pract. and Proc.* 311).

So states Judge Parker: "This motion is in the nature of an application for a writ of error *coram nobis* and is merely declaratory of existing law." 8 F. R. D. 171, 175, citing *Bell v. United States*, 129 F. 2d 290 (C.A. 5), and *Barber v. United States*, 142 F. 2d 805 (C.A. 4).<sup>3</sup>

The memoranda prepared and circulated for the Judicial Conference contain similar statements. See Govt. Brief App. 93 ("in the nature of a writ of error *coram nobis*"); *id.* 167 ("the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error *coram nobis*"); *id.* 171 ("in the nature of a writ of error *coram nobis*").

Not only were *coram nobis* and the motion for a new trial the models. It was apparently assumed that the applicant's presence was not required on either of these procedures and was therefore not required on the substituted motion under section 2255.

Insofar as the motion procedure is applied to issues that would not call for the prisoner's presence on *habeas corpus*, this feature raises no problem. Motions to correct or reduce sentence, motions resting on allegations that are contro-

<sup>3</sup> It will be recalled that the survival of *coram nobis* in the Federal courts had been extensively argued, but not settled, in *Wells v. United States*, 318 U. S. 257.

verted by the record, motions resting on an unsound legal contention,—all can be disposed of without bringing in the prisoner. Compare *Holiday v. Johnston*, 313 U. S. 342; *United States v. Lynch*, 159 F. 2d 198 (C. A. 7); *Berg v. United States*, 176 F. 2d 122 (C. A. 9); cf. Rule 43, Federal Rules of Criminal Procedure (presence of defendant not required at reduction of sentence under Rule 35). Thus there is substantial scope for the employment of the motion procedure.

But as applied to disputed issues of fact, the assimilation of the procedure to *coram nobis* and motions for a new trial was crucial. The assumption was that on *coram nobis* the applicant's presence at the hearing was not necessary. Judge Parker stated his understanding in 1944, while serving as chairman of the Judicial Conference Committee:

"Whether the motion is treated as in the nature of a petition for writ of error *coram nobis* under the old practice or as a motion for a new trial, it is perfectly clear that appellant had no constitutional right to be present at the hearing of the motion and cannot complain because the Court refused to order that he be brought from prison and produced at the hearing. Such a hearing is in no sense a part of the criminal trial at which the Constitution requires the presence of the accused. As on the hearing of an appeal or writ of error in a higher court, what is under investigation on such motion is, not the guilt or innocence of the accused, but the validity or regularity of the proceedings attending his trial." *Barber v. United States*, 142 F. 2d 805, 806 (C. A. 4).

This understanding was broadly shared, both before and after the effective date of section 2255. Contrasting a motion procedure (raising the issue of no competent waiver of counsel) with habeas corpus, the court in *Cuckovich v. United States*, 170 F. 2d 89, 90 (C. A. 6) observed: "While appellants might have been entitled to be present, to testify,

and to cross-examine witnesses at a hearing in an independent habeas corpus proceeding, they do not have such a right in a hearing on a motion made after judgment in the original proceeding." And see *Berg v. United States*, 176 F. 2d 122, 124 (C.A. 9): "But the writ of *coram nobis*, which is crystallized in the statute, was intended to afford relief against a void sentence. Since it was an appeal to the trial judges on the record, there was no personal appearance of the movant required." See also *United States v. Mahoney*, 43 F. Supp. 943 (W. D. La.).

This assumption regarding *coram nobis* was thoroughly exploded in a very recent decision of the New York Court of Appeals, in a strong opinion by Judge Desmond. *People v. Richetti*, 302 N. Y. 290 (holding that the prisoner has a right to be produced at a hearing on the motion, raising an issue of fact concerning offer of counsel). The older books are quite explicit in asserting the right, on *coram nobis*, to a formal trial on the disputed issue of fact; indeed, where the original judgment was based on a jury verdict, the trial on *coram nobis* was also to a jury. See Note to *Jaques v. Caesar*, 2 Sand. 100; 1 Archbold, *Practice* 281; 2 Tidd, *Practice* 1121-22 (3d ed. 1803); T. W. Powell, *Appellate Proceedings* 111-112 (1872); *Saunders v. State*, 85 Ind. 318.

The supposed analogy to motions for a new trial also falls. While it may be conceded that the movant's presence is not required on such a motion, the comparison is not apt, for the grounds asserted on a motion for new trial do not touch those basic defects in the criminal proceeding that are the subject of habeas corpus or the new procedure under section 2255.

The views of each member of the Judicial Conference or its committee on this problem are not known.<sup>4</sup> Quite possibly some of the members recognized from the begin-

<sup>4</sup> A statement of Judge Stone is discussed *infra*, p. 18.

ning that the necessity for production of the prisoner was more extensive than these analogies indicated. In that event, in applying the section they would presumably have given correspondingly less scope to the motion procedure and more to the remedy on habeas corpus. Whether this result was foreseen or follows from a present recognition that basic assumptions underlying the section are untenable, the consequence is the same: the motion procedure yields to habeas corpus where disputed issues of fact entitle the prisoner to be brought in. Otherwise, as we have suggested, the motion would be in substance a transfer of habeas corpus to the distant sentencing court—a result plainly not contemplated or desired.

In this light, it is not surprising that the District Court in the present case proceeded without the presence of the prisoner. The whole atmosphere of section 2255 is congenial to that practice. The error of the District Court was not in its understanding of the motion practice but in its failure to discern that in a case where the prisoner has a right to be brought in as on habeas corpus the procedure is "inadequate or ineffective" and should yield to habeas corpus. The meaning of "inadequate or ineffective" will depend on the statutory privilege of the prisoner to be produced on the motion, in a kind of inverse relation—the narrower the privilege on the motion, the more inadequate the remedy.

What is the intended criterion of this privilege under section 2255? We have sought to show that it was the supposed analogy of *coram nobis* and motions for a new trial, and that since this standard is untenable, as the Government would agree it is, the inadequacy of the remedy is greater than some, at least, of its sponsors recognized. To make the standard the same, or approximately the same, as that for habeas corpus would strengthen the adequacy of the remedy but would require a major judicial operation on the statute.

The studiously contrived motion procedure would be converted into a mere change of venue; and prisoners who would otherwise be transported across San Francisco Bay from Alcatraz to the District Court could look forward to extended, even transcontinental journeys.

The Government's suggestion (Brief 58) is that the prisoner must be produced wherever substantial factual issues are presented on which the testimony and credibility of the prisoner is important, absent special circumstances. This test is surely broader than that envisaged by Judge Parker, so that it disturbs the contemplated balance of remedies, and yet not broad enough to be truly adequate. Would not a prisoner's presence be required at a hearing on the issue of mob domination of a trial, or knowing use of perjured testimony by the prosecution, where the prisoner could be of assistance in eliciting the facts even though he did not expect to be a witness? The Government's standard is avowedly based on the assumption that on habeas corpus evidence outside the record became admissible only by virtue of statute (Brief 57)—an assumption which we discuss *infra* pages 34-35.

Moreover, it is not clear what is meant by the "special circumstances" that in the Government's view would dispense with the prisoner's presence. This seems to be an echo of a suggestion by Circuit Judge Stone, who would have had the habeas corpus judge weigh the danger, cost and inconvenience of production. This memorandum, quoted at length in the Government's brief (pp. 27-29), was apparently not submitted to the full Judicial Conference or to its committee (Govt. Br. App. 121). The standard suggested was not adopted by Judge Parker in his own explanation after he resumed the committee chairmanship; in submitting the bill to all Federal judges for comment, he simply stated, on this point: "The power to grant relief under habeas corpus where injustice would otherwise

result is carefully preserved." (Govt. Br. 172.) Finally, Judge Stone was seeking to interpret a clause not identical with that adopted; at that time it read: "unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons." See H. R. 4233, 79th Cong. 1st sess., Appendix, *infra*, p. 49.

The practice under section 2255 is far from conforming to standards that would be followed on habeas corpus. The available data indicate, what was to be expected, that in fact prisoners have not been brought before the sentencing court as they would be before a habeas corpus court. Statistics compiled by the Administrative Office of the United States Courts show that of 76 motions reported to it as filed and disposed of under section 2255 in the year 1948-49, in only 12 instances were the prisoners produced for a hearing.<sup>5</sup> A further analysis, in terms of individuals instead of motions (i.e., eliminating multiple motions by the same prisoner) shows that of 67 prisoners filing these motions only 6, or 9 percent, were afforded a personal hearing. While the full significance of these figures would

<sup>5</sup> The figures are taken from Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio St. L. J. 338 (1949) (Tables 8 and 11), and from a supplementary memorandum of October 3, 1951, furnished to counsel on both sides, prepared by Mr. Speck in the Administrative Office of the United States Courts. A copy of the memorandum will be filed with the Clerk. Grateful acknowledgement is made to Mr. Speck and to the Chief of the Division of Procedural Studies and Statistics and the Director of the Administrative Office.

The number of motions filed is actually greater than these figures show, since they are based on reports from Clerks who are directed to, but do not always, docket motions under section 2255 as separate proceedings. Where such motions are docketed under the original case they are not separately reported; this circumstance should not affect the validity of the ratio shown between total motions and presence of the prisoner; if anything, the summary dispositions may be understated because not docketed as a new proceeding.

require an intensive study of the grounds asserted in the motions, it appears from the descriptive information furnished by the clerks of the district courts in transmitting the data that most of the motions raised issues of fact (such as want of competent waiver of counsel) meriting a hearing.<sup>6</sup> These figures should be compared with those for habeas corpus applications. In the five principal districts for habeas corpus applications by Federal prisoners, during 1941-42, of a total of 233 cases the writ was issued and a hearing on the facts was held in 102 cases, or 44 percent. During the period 1939-48, of the non-deportation habeas corpus cases involving Federal custody, an annual average of between 30 and 40 percent were decided after trial. The disparity between the procedures is striking.

The figures furnished to the Government by United States Attorneys (Govt. Br. App. 187-197) show a thin trickle of cases in which the prisoner was produced on the motion, though none at all in some districts, including the Southern District of New York. The figures appear particularly meagre when it is remembered that they cover the entire three-year period since the section became effective.

Our conclusion is that in design and execution the motion procedure is not governed by standards approximating those on habeas corpus, and that if such standards must prevail, as the Government apparently concedes, the motion procedure is inapplicable.

#### C. THERE IS NO PROCESS FOR BRINGING RESPONDENT BEFORE THE SENTENCING COURT

Not only is the motion procedure inapplicable; it is inadequate because the sentencing court has not been given authority to order respondent brought in from a prison outside the district.

<sup>6</sup> Based on an inspection of the data furnished by the Clerks.

Obviously a mere subpoena is of no avail to bring a prisoner before the court. See 8 Wigmore, *Evidence* Sec. 2199 (3d ed. 1940). Hence it seems unnecessary to decide, in this connection, whether the motion procedure is governed by the Federal Civil Rules (No. 45(e)) limiting the territorial scope of subpoenas to the district or one hundred miles of the place of trial, or by the Criminal Rules (No. 17(e)) authorizing service at any place in the United States. It is hardly possible, in any event, that Rule 17 of the Criminal Rules would be applicable, coming as it does under the head of "Arraignment and Preparation for Trial."

It is fundamental that the process of a district court does not extend beyond the district unless Congress has made provision for such extension. *Robertson v. Railroad Labor Board*, 276 U. S. 619, 622; *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 467. Three possible statutory bases for such authority must be considered: the habeas corpus legislation; the "all writs" section; and Section 2255 itself.

### 1. *The Habeas Corpus Legislation*

This legislation, limiting courts to issuance of the writ in cases "within their respective jurisdictions," precludes issuance of the writ *ad subjiciendum* where the prisoner is confined in another district. *Ahrens v. Clark*, 335 U. S. 188. While the Act of February 5, 1867, which contained the limiting words was directed specifically to the writ *ad subjiciendum*, 14 Stat. 385, the writ *ad testificandum* is subsumed under the same words in Title 28, Section 2241. If it be argued that the limiting words apply only to the commencement of a proceeding and not to subsequent steps in a cause which was properly anchored at the outset, the answer may be found in decisions antedating *Ahrens v. Clark*, holding that jurisdiction is lost when in ordinary course the prisoner is removed outside the district. *United States ex rel. Innes v. Crystal*, 319 U. S. 755; *cf. Ex parte Endo*, 323

U. S. 283. Actually the impediment in the present case is more fundamental than in the *Ahrens* case. There, the district court admittedly had jurisdiction over the ultimately responsible custodian, the Attorney General; the only question was whether the prisoner must also be confined in the district to warrant issuance of the writ. Here, neither the custodian nor the prisoner is within reach of process within the district.

## 2. *The "All Writs" Section*

It has been held that the authority conferred on district courts by Section 1651 of Title 28 (formerly Section 262) to grant all writs necessary in aid of their jurisdiction is a characterization of the process, not a grant of extraterritorial power. *Mitchell v. Dexter*, 244 Fed. 926 (C. A. 1). Recently this limitation has been acknowledged in its specific application to process in the nature of a writ of habeas corpus *ad prosequendum*. *Phillips v. Hiatt*, 83 F. Supp. 935 (D. Del.); see also *United States v. Coles*, 88 F. Supp. 150 (D. Ore.)

Of special significance is the fact that shortly before the enactment of Section 2255 doubt was expressed in noteworthy quarters that process was available to bring in a prisoner from outside the district for a hearing of a motion to vacate his judgment of conviction. In 1944, Judge Parker, who was then serving as chairman of the committee appointed by the Judicial Conference which drafted the legislative precursors of Section 2255, rejected a prisoner's request to be produced in those circumstances, quoting the following statement by Judge Sibley in *Bell v. United States*, 129 F. 2d 290, 291 (C. A. 5): "The refusal to do it was well within the court's discretion, assuming that by some writ it could have been accomplished." *Barber v. United States*, 142 F. 2d 805 (C. A. 4). The *Bell* and *Barber* cases were cited later by Judge Parker as reflecting the law of which section 2255 is declaratory. See p. 14, *supra*.

## 3. Section 2255

Against this background of denial and doubt, under both the habeas corpus and "all writs" provisions—a background neither remote nor obscure—it would be natural for sponsors of new legislation who wished to assure power to produce a distant prisoner to confer that power in express terms. The evolution of the text of Section 2255 is revealing in this regard. The first bill sponsored by the Judicial Conference contained no provision on process. See H. R. 4233, 79th Cong. 1st sess., Appendix, *infra*, p. 47. In the next version, however, such a provision was included: "The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States." H. R. 6723, 79th Cong. 2d sess., Appendix, *infra*, p. 52. This critical sentence was eliminated from the bills on revision of the Judicial Code. H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 52.

Not only was a provision for process outside the district eliminated. There was inserted a provision that "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 53. Thus every encouragement was given to the district courts to proceed despite the inability of the prisoner to be present.

It is not surprising, therefore, that the same doubt of the court's power to order a distant prisoner produced, which we noted prior to the enactment of Section 2255, has been repeated by Judge Parker after the enactment: ". . . but, assuming without deciding that the judge had power to enter an order that he be produced, it is perfectly clear that the judge was acting well within his discretion in refusing to do so." *Carvell v. United States*, 173 F. 2d 348 (C. A. 4).

The practice of producing a prisoner for resentencing in the criminal court after an order by a habeas corpus court

so requiring is not apposite. The habeas corpus court could order the prisoner released unless the Government produces him in the sentencing court.

Nowhere is there any affirmation that Section 2255 conferred additional power on the district courts. As we have seen, the section is authoritatively described as a clarification of existing law, making certain the power to entertain a motion in the nature of a motion for a writ of error coram nobis.

**D. IF THE PRISONER'S PRESENCE CAN BE EFFECTED BY A DISCRETIONARY ACT OF THE GOVERNMENT OR THE DISTRICT COURT, SUCH A PROCEDURE IS INADEQUATE.**

If, contrary to our contention, it is concluded that section 2255 does contemplate the presence of the prisoner in the sentencing court as on habeas corpus, there remains the problem of the means to effect that presence. We have argued that there is no basis for finding authority to issue process to secure the production of a prisoner held outside the district. We shall now consider the adequacy of expedients which have been suggested and to a limited extent employed for this purpose.

The first expedient is the voluntary production of the prisoner by the Government. It may be doubted whether the Government's concession in the present case, that the respondent has a right to be present, is not irrelevant. Even if the concession carries the implication that, absent some legal process, the Government will nevertheless produce the prisoner, it is submitted that the concession comes too late. What is relevant is the adequacy of the motion procedure as of the time of the application of the prisoner for vacation of judgment. If the Government makes no offer at that time to produce him, and the district court dismisses his motion with leave to file a petition for habeas corpus elsewhere, must he nonetheless appeal from the dis-

missal, and apply to this Court for certiorari, on the chance that at some point the Government will consent to bring him before the sentencing court? And if the prisoner initiates his action by way of habeas corpus rather than by motion, and the habeas corpus court is confronted with the question of adequacy of the motion procedure, must the court invariably remit the prisoner to the latter procedure because the Government may choose at some stage to concede the right to be present? Was it not contemplated that a habeas corpus court could determine the adequacy of the motion procedure at the outset of the prisoner's application? While the discretion of a tribunal may sometimes have to be invoked before a remedy can be said to be inadequate (cf. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337), it is a wholly different matter to require that the discretion of an adverse party be invoked and pursued. There is no more reason for insisting on such extended pursuit of executive discretion of a jailor than there is of requiring resort to the discretion of a censor. Compare *Schneider v. State (Town of Irvington)*, 308 U. S. 147.

Moreover, even if the concession of the Government is relevant, an offer to produce the prisoner is not an adequate substitute for the court's power to compel his production. It is of the essence of the Great Writ that the liberty of the subject does not depend on the amiability of executive officials. It is not an if-it-please-your-majesty sort of remedy. It is a writ of right, not of grace. 3 Bl. Comm. 132-33; Bac. Abr. *Habeas Corpus*, B. 3; Church, *Habeas Corpus*, sec. 87. It must be remembered that although it is a judicial conviction that is attacked under section 2255, in significant instances it is the conduct of the prosecuting arm that is in question; and section 2255 evidences no purpose

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<sup>7</sup> Note that section 2255 says "is," not "has been," inadequate, and permits *habeas corpus* in that case where the prisoner "has failed to apply" by motion to the sentencing court.

to introduce complicating differentiations based on the nature of the constitutional vice in a conviction. The fact that relations with the executive branch are happily co-operative should not obscure the function of habeas corpus or its substitutes in vindicating the rule of law in time of stress. We are not speaking of a time of total collapse of civilian authority (cf. *Ex parte Merryma<sup>th</sup>*, 17 Fed. Cas. 144), but of the tensions that can be expected to beset a functioning legal order. Unilateral disarmament in a time of harmony may bring regrets in a less happy season.

We turn to the possibility that the court itself has power to require the production of the prisoner, by issuing a writ of habeas corpus *ad testificandum*, despite the considerations that, in our submission, negative this power. See p. 21, *supra*. The issuance of such a writ is at best discretionary, and in cases not arising under section 2255 the courts have taken into account the cost and inconvenience of transporting the prisoner, especially where production is sought at Government expense. *Neufeld v. United States*, 118 F. 2d 375, 385 (App. D. C.); *Gilmore v. United States*, 129 F. 2d 199, 202 (C. A. 10); *Murray v. United States*, 138 F. 2d 94, 96 (C. A. 8); *Bugg v. United States*, 140 F. 2d 848, 850 (C. A. 8). This discretionary power, if it exists under section 2255, is not an adequate substitute for the duty to order the prisoner to be produced. This Court has held unconstitutional state statutes which failed to prescribe a duty of notice and hearing, even though notice and opportunity to be heard were in fact afforded in the particular case. *Coe v. Armor Fertilizer Works*, 237 U. S. 413; *Wuchter v. Pizzutti*, 276 U. S. 13, and cases there cited. Surely a statute touching the most fundamental liberty of the person is entitled to be judged by standards not less exacting than those applied to the procedure in stock assessments or negligence cases.

## II

If Applied in the Present Case Section 2255 Would Be an Invalid Suspension of the Privilege of the Writ of Habeas Corpus.

A decision that the motion procedure under section 2255 is inapplicable in the case at bar, for the reasons set forth in Point I of this brief, would render unnecessary a decision of the constitutional issue. If that issue is faced, its gravity is indicated by the fact that two Circuit Judges in the present case, including one who was a member of the committee of judges which considered the problem of habeas corpus, have ruled section 2255 unconstitutional; that another Circuit Judge has reached the same conclusion if the motion procedure is employed as a substitute for habeas corpus (Huxman, J., dissenting in *Barrett v. Hunter*, 180 F. 2d 510, 516); and that a number of other judges, as well as the principal draftsman of the Revision of Title 28, have avoided or minimized the problem only by construing the motion procedure as a mere prerequisite to habeas corpus (see pp. 8-10, *supra*).

We do not understand the Government to contend that the motion is designed as a mere prerequisite by way of exhaustion of remedies, despite the reference in its brief to cases of that kind (Govt. Br. 81-84). The question may be put concretely: if the respondent were accorded a hearing and were unsuccessful in subsequent proceedings in the district court in the present case, would he be entitled thereafter under the statutory scheme to seek habeas corpus in the district of his confinement? The answer, we believe, is No, for the reasons stated at the outset (*supra*, pp. 10-12); and the Government would apparently agree. It is therefore unhelpful to analogize the statutory plan to the exhaustion of state procedures or administrative remedies. Con-

stitutional problems of suspension would remain if the motion were in fact a prerequisite, since at least delay in recourse to habeas corpus after imprisonment would be involved. The problems are obviously graver under the actual statutory plan.

**A. THE CONSTITUTIONAL ISSUE CANNOT BE MET BY RELIANCE ON THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS.**

Article I, section 9 of the Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion the public safety may require it." Article III gives undoubted power to Congress to prescribe the jurisdiction and process of the lower Federal courts and the appellate jurisdiction of this Court. If there is a latent conflict here, the debates in the Constitutional convention and the ratifying assemblies failed to resolve it or even to perceive it. See Govt. Brief 62-63.

Fortunately no occasion has arisen in our history for the decision of such an issue. It is true that in *Ex parte Bollman*, 4 Cranch 75, 93, Chief Justice Marshall said that "the power to award the writ by any of the courts of the United States, must be given by written law." But the case involved only the jurisdiction of this Court to award habeas corpus under the Act of 1789 in a cause which the Court had no authority finally to decide. In fact the power was sustained; and the remark of the Chief Justice should be confined to the distribution of authority within the Federal judicial system, for nothing more was at stake. It is also true that in *Ex parte McCordle*, 7 Wall. 509, the repeal of appellate jurisdiction in this Court over cases of habeas corpus was upheld; but again, the jurisdiction of the lower courts to grant the writ had not been disturbed. Indeed, in *Ex parte Ferger*, 8 Wall. 85, the jurisdiction of this Court

to award habeas corpus was maintained by virtue of its original-appellate jurisdiction despite the repeal of the statute authorizing appeals in such cases. It was almost unthinkable that Congress would make no provision for habeas corpus and thus precipitate the question now stirred: "In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them." 8 Wall. at 95-96.

There must, to be sure, be courts legislatively created before the writ of habeas corpus can be employed. But having established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter. The Constitution does not merely prohibit suspension of habeas corpus acts, or of the writ, but of "the privilege of the writ," a privilege long antedating the codification and reforms embodied in English statutes of the seventeenth century—the Petition of Right of 1628 and the Habeas Corpus Acts of 1641 and 1679. See 9 Holdsworth, *History of English Law* 112-125 (3d ed. 1944); Cohen, *Habeas Corpus Cum Causa*, 18 Can. B. Rev. 10, 172 (1940). The vitality of Article I, section 9 cannot be preserved by simply treating it as a limitation on executive rather than legislative suspension. It was precisely the instances of legislative suspension in England that moved the Framers to incorporate the guarantee. Those suspensions, it must be remembered, were not suspensions of the Habeas Corpus Acts but of the privilege of the writ (whether statutory or at common law) in particular classes of cases. See Dicey, *Law of the Constitution* 225 (8th ed. 1915). Doubtless the most offensive instance was in relation to persons taken in the act of treason on the high seas or in any of the colonies,

to whom the writ was denied by the English Act of 1777, 17 Geo. III, c. 9. See 3 May, *Constitutional History of England* 11-12 (1882); Hurd, *Habeas Corpus* 132 (1858). The Framers did not in Article III let slip the dearly held guarantee secured in Article I, section 9.

**B. THE CONSTITUTIONAL ISSUE IS NOT MET BY RESORT TO THE ENGLISH ACT OF 1679 OR THE PRACTICE IN 1789.**

While the Government disclaims as the governing test of constitutionality the practice in 1789, its reliance on the English Act of 1679, 31 Car. II, c. 2, colors much of the argument (Brief 56-57, 74-76). In particular it is maintained that habeas corpus did not lie on behalf of a prisoner convicted by a court of general criminal jurisdiction and that on habeas corpus factual inquiries were not permitted. (*Ibid.*; 76-77). In our view, the governing criterion is not the Act of 1679, which in fact left cases of convicted persons to the common-law writ; the writ was in fact available to prisoners convicted by a court of general criminal jurisdiction and factual inquiries could be made; and the developing use of the writ in the Federal courts has not rested on statutory grant but on a normal exercise of the judicial process.

*1. The English Act of 1679 is not the measure of the constitutional guarantee*

For a number of reasons the precise practice under English law in the seventeenth and eighteenth centuries does not delimit the constitutional guarantee. In the first place, the Act of 1679, principally relied on by the Government, did not mark the full extent of the privilege of habeas corpus even at that time. The common-law writ remained in force and has become the principal source of habeas corpus in England.

The Act of 1679 was designed to remedy certain specific abuses and to that end provided for the grant of the writ

in vacation, prompt return to the writ instead of evasive alias and pluries writs, extension of its territorial scope, and penalties for violation. The statute differentiated between persons held for treason or felony and for lesser offenses; as to the former, the writ guaranteed prompt indictment (sec. 6), and as to the latter, in proper cases, release on bail (sec. 2). It is thus evident that the Act, taken precisely, turns on such matters, irrelevant for our purposes, as terms of court, definitions of felony, and bailable offenses.

But a curious misreading of the Act by early state legislatures in this country, shared by certain commentators and the Government in the present case, has produced a misleading conclusion. The Government states (Brief 74): "For it is clear that at the time of the Constitution habeas corpus was never conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The English Act of 1679, 31 Car. II, c. 2, which was in force in England in 1789, expressly excepted '*persons convict or in execution by legal process*' from those eligible to apply for the writ." (Italics added). The italicized words suggest that if a person was convicted by legal, in the sense of lawful, process, he was not eligible to apply for the writ. Actually a misplaced parenthesis has distorted the true reading of the Act. The authentic text reads (Statutes of the Realm, 31 Car. II, c. 2, sec. II):

"And if any person or persons shall be or stand committed or detained as aforesaid for any Crime unlesse for Treason or Fellony plainly expressed in the Warrant of Commitment in the Vacation time and out of Terme it shall and may be lawfull to and for the person or persons soe committed or detained (other then persons Convict or in Execution) by legall Processe or any one [in] his or their behalfe to appeale or complaine to the Lord Chauncellour . . ."

— Thus the phrase “legal process,” so far from meaning “lawful process” and constituting a criterion for determining which convicted persons were and which were not entitled to seek the writ, was a term of inclusion (probably in ~~contradistinction~~ to private restraint); and convicted persons were wholly excepted from the section, leaving their rights to be worked out through the common-law writ. The section itself deals with bail, which would normally not be the object of persons seeking the writ after conviction. At the close of the section it is provided that release on bail shall be granted, having regard to the “quality of the prisoner and the nature of the offence,” to secure his appearance at the next session of the Kings Bench or Assizes—

“unlesse it shall appeare unto the said Lord Chauncellor or Lord Keeper or Justice or Justices [or] Baron or Barons that the Party soe committed is detained upon a legall Processe Order or Warrant out of some Court that hath Jurisdiction of Criminall Matters or by some Warrant signed and sealed with the Hand Seale of any of the said Justices or Barons or some Justice or Justices of the Peace for such Matters or Offences for the which by the Law the Prisoner is not Baileable.”

This latter provision, introducing the concept of a court of general criminal jurisdiction, is not free from ambiguity; it excepts from the privilege of bail either those held by a warrant of such a court or those held by such a warrant for a nonbailable offense. In either case it has no bearing on the rights of one whose trial is behind him and who seeks discharge or a new trial through the common-law writ.<sup>8</sup>

Moreover, the grounds for habeas corpus in England cannot be equated with our own without ignoring funda-

<sup>8</sup> “The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute.” 10 *Laws of England* 44, note h (Halsbury ed. 1909); 9 *Halsbury's Laws of England* (1933) 707, note u. It has been said that the statute is not applicable in term time. *Hobson's Case*, 3 B. & Ald. 420, 425.

mental constitutional differences stemming largely from our judicially enforced Bill of Rights and the subordination of the legislature to judicial review. In England, for example, it has been held that habeas corpus will not lie to test the validity of imprisonment by order of a House of Parliament for contempt of that body. *Case of the Sheriff of Middlesex*, 11 Ad. & El. 273. Compare the unquestioning exercise of habeas-corpus jurisdiction by our courts in such a case. *Jurney v. McCracken*, 294 U. S. 125.

Finally, and most important, the English practice was an evolving one, under continuous judicial and Parliamentary re-examination, and subjected to a series of liberalizing reforms by courts and legislature both before and after 1789. See 9 Holdsworth, *History of English Law* 112-125 (3d ed. 1944); Cohen, *The Writ of Habeas Corpus Cum Causa*, 18 Can. B. Rev. 10, 172; Hallam, *Constitutional History of England* 500-502 (5th ed. 1867). Changes were constantly pressed and were delayed by the House of Lords and by the assurances of the judges that judicial power would prove adequate. *Ibid.*; see the questions addressed to the Judges by the House of Lords and the answer of Wilmot, J., in 1758 in Wilmot, *Notes of Opinions* 77-129. Certain legislative provisions were enacted in 1816, 56 Geo. III, c. 100, but these related only to non-criminal cases. Against this background of flux and empiric responsiveness, it would be mistaken in the extreme to try to capture the state of the law at a moment of time and identify it with the guarantee in the Constitution. No such fallacy has crept into this Court's treatment of comparable guarantees, such as the right to the assistance of counsel and freedom of the press. *Johnson v. Zerbst*, 304 U. S. 458; *Near v. Minnesota*, 283 U. S. 697; cf. *Funk v. United States*, 290 U. S. 371. We shall have to look to history for the essentials of the Great Writ, but not to one point in that history for its accidents. In that sense it is fair to say of seventeenth and eighteenth century

lawmakers that we do not sit in their councils; we invite them to sit in ours. Cf. Curtis, *Lions Under the Throne* 2 (1947).

2. *The common-law writ was available to a convicted prisoner and permitted factual inquiry*

The availability of habeas corpus to one convicted by a court of general criminal jurisdiction was established at least as early as 1670, by the decision in one of the most revered cases in Anglo-American law, *Bushell's Case*, Vaughan 135, 6 St. Tr. 231. Bushell, it will be recalled, had been sentenced for contempt as a juryman at the Old Bailey; he secured his discharge on habeas corpus from the Court of Common Pleas. The Act of 1679 left this ruling unaffected; as we have seen, it simply excepted cases of convicted persons from the statutory provisions relating to release on bail. Two centuries later we find the principle of *Bushell's Case* alive and extended. In *In re Authers*, 22 Q. B. D. 345 (1889), Coleridge, C.J., and Hawkins, J., joined in granting habeas corpus to a prisoner whose conviction had been affirmed on appeal to quarter sessions, where it appeared that the conviction was not supportable as one for a second offense. See also *Souden's Case*, 4 B. & Ald. 294; *King v. Hawkins*, Fortes. 272.

The same cases indicate that factual inquiries were permissible on habeas corpus. In *In re Authers*, *supra*, affidavits were taken; and in *Bushell's Case* Chief Justice Vaughan distinguishes the case of a prisoner held for trial from that of one already convicted. The objection to a factual inquiry in the first case is that it tends to anticipate the province of the jury, so long as a prompt trial is assured, while in the second case the opportunity must be given on habeas corpus or not at all. Vaughan, 142-143.

Similarly Wilmot advances as an objection to controverting the return that the issue ought to be tried by a jury—an objection not compelling after final judgment. Wilmot, *supra*, at 122-123. That the return might be confessed and avoided by other facts was laid down in Hawkins, *Pleas of the Crown, Bail*, secs. 78-79, and Bacon, *Abridgment, Habeas Corpus*, B, 11. Somewhat more liberality appears to have been shown in permitting actual controversion of the return in cases of impressment than in criminal cases. A careful student of the subject has thus summed up the common-law practice: "The result is that in cases of commitments for crime or supposed criminal matters, it is impossible to specify those in which the truth of the return could be controverted, and in all others it is impossible to specify those in which it could not." Hurd, *Habeas Corpus* 277 (1858).

When the critical distinction between pre-trial and post-trial cases is kept in mind, it is evident that the resources of the common-law practice were adequate, without legislation, to examine into facts tending to vitiate a conviction or sentence. This conclusion is highly important when we turn to consider the source of such power in the Federal courts.

### 3. *The authority of the Federal courts to vindicate constitutional rights on habeas corpus does not stem from Congressional grant of power.*

The first Judiciary Act, after distributing judicial power in the hierarchy of Federal courts, provided (Act of Sept. 24, 1789, c. 20, sec. 14, 1 Stat. 73):

"That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the

exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the same authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Thus the nature and grounds of the writ were left to be determined by the courts. "No law prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution, as one which was well understood. . . ." Marshall, C.J., in *Ex parte Watkins*, 3 Pet. 193, 201. Only the problem of Federalism was resolved by Congress, in preventing the use of the writ on behalf of state prisoners; this problem was a distinct one, left for the guarantees of state constitutions.

The development in the availability of the writ has proceeded from cautious beginnings in the Federal courts, but the evolution has been faithful both to the essential nature of the writ and to the best traditions of the judicial process. The cautious beginnings are exemplified in the leading case of *Ex parte Watkins*, *supra*, where a prisoner sought *habeas corpus* in the Supreme Court after conviction in a Federal circuit court, apparently on the ground that the indictment stated no offense or none cognizable in the particular circuit court. Several factors conspired to produce a decision denying the writ. First, the application was made to the Supreme Court, which had no original jurisdiction in the case and no appellate jurisdiction in criminal cases. Second, the Court tended to assimilate

the case to one under the English Act of 1679, stating: "This statute may be referred to, as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody." 3 Pet. at 202. It was then easy to point out that persons convicted by the judgment of a court were not within the Act, and to make the case turn on whether the judgment was a "nullity." This approach overlooked the fact that the Act of 1679 left all convicted persons to the common-law writ, that the exclusion related to release on bail, and that in any event the Act apparently applied only to applications in vacation time. See pp. 30-32, *supra*. Third, the Court identified the problem with that of an action for false imprisonment, *id.* at 203, ignoring the fact that in *Bushell's Case*, 1 Mod. 119, an action for false imprisonment was denied although in *Bushell's Case*, Vaughan 135, habeas corpus had been granted to the same petitioner.

While retaining the bridgework of such concepts as "void," "nullity," and "without jurisdiction," this Court gradually recognized the historic potentialities of the writ. In *Ex parte Lange*, 18 Wall. 163, habeas corpus was granted where the prisoner had paid a fine and begun a term of imprisonment, and the trial court during the term had remitted the fine and sentenced him to imprisonment only, the statute authorizing only one or the other. The court admittedly had jurisdiction to decide the criminal case and impose sentence; but Mr. Justice Miller observed that after the fine had been paid "The power of the court to punish further was gone." 18 Wall. at 170. This process of reasoning, familiar enough in the "principles and usages of law," was carried further in *Ex parte Siebold*, 100 U.S. 371, entertaining habeas corpus to challenge the validity of the statute under which the prisoner had been convicted. The opinion of Mr. Justice Bradley returns to first princi-

ples. After noting the distinction taken between erroneous and void judgments, he said (p. 376):

"It is stated however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10."

If there is inserted in this quotation the clause "or by a process whereby no man ought to be punished" it would serve admirably to describe the grounds for habeas corpus today. The evolution from "lack of jurisdiction" owing to invalidity of the criminal statute to "loss of jurisdiction" owing to fundamental vices in the procedure is too familiar to recount. *Johnson v. Zerbst*, 304 U.S. 458; see Notes, 35 Col. L. Rev. 404; 61 Harv. L. Rev. 657.

But, it is said, this development was not implicit in the basic writ but stems from a new seed planted by Congress in the Act of February 5, 1867, 14 Stat. 385, c. 28. That Act gave power to the Federal courts to grant the writ "where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States," and authorized appeals to the Supreme Court. The object of the Act was to protect Federal officials who might be imprisoned through hostile state action, and it was an "ironic stroke" that its appeal provision was early invoked by a prisoner seeking release from federal confinement under the Reconstruction Acts themselves. See 2 Warren, *Supreme Court in United States History* 465 (rev. ed. 1926). At all events, the Act did not transform the conception of habeas corpus for federal prisoners. It was not even mentioned in the *Siebold* case. Mr. Justice Bradley relied not on the Act of 1867 but on Chief Baron Gilbert and Matthew Bacon and Chief Justice Vaughan.

The Act of 1867 also provided that the petitioner might deny any facts set forth in the return, or allege others, and that the court should determine the facts in that event. As we have seen, pages 34-35, *supra*, the courts needed no legislative grant thus to administer the writ.

#### C. THE ESSENTIALS OF HABEAS CORPUS ARE LOST IN THE MOTION PROCEDURE UNDER SECTION 2255

The ultimate question is whether in the aggregate the departures in the motion procedure from the traditional concept of habeas corpus so transform the historic writ as to constitute a suspension of it. A suspension can be wrought as well by cumulative inroads as by a dramatic stroke; the liberty of the subject can be lost by erosion no less than by avulsion. It must be remembered that the problem is not simply whether a substitute has been provided which would satisfy the due process clause of the Fifth Amendment. So to view the problem would ignore the central fact that the Constitution contains a habeas corpus clause. Nor is the problem met by reference to the privilege of appeal from criminal convictions. The attacks on convictions with which we are concerned involve matters outside the record of the criminal trial. Nor will it do to suggest that certain constitutional challenges which this Court has held to be appropriate on habeas corpus are more fundamental than others, for Section 2255 does not purport to be separable, and any distinctions based on degrees of constitutional vices would introduce new and unwanted complexities in the procedure.

What are the essentials of habeas corpus and how does the motion procedure affect them? The writ is a peremptory remedy, issued as of right where the application (taken together with the petitioner's traverse to the return) is not "palpably unmeritorious." *United States ex rel: McCann v. Adams*, 320 U. S. 220, 221. It is a remedy which is not

exhausted by a single adjudication and denial. *Salinger v. Loisel*, 265 U. S. 224; *Eshugbayi Eleko v. Government of Nigeria* [1928], A. C. 459. The principle of repose gives way to the recognition that it must never be too late to discover the truth which would set free a prisoner confined for a cause for which no man should be restrained or by a process whereby no man should be convicted.

Examined in the light of these essentials the motion procedure is seen to be a mere shadow of the great writ. The standards governing the production of the prisoner are at best confused and uncertain. Whether there is any process for bringing him in, whether his presence depends on the cooperation of the Government, whether the standards are those of convenience or some other criterion short of the traditional criteria on habeas corpus, are questions left unresolved by the statute. The practice under it, as has been seen, makes it abundantly clear that the courts do not regard it as simply a change of venue in habeas corpus. See pp. 19-20, *supra*. The failure of the statute to refer to standards applicable in habeas corpus, to refer to the production of the prisoner save by encouragement not to produce him, or to specify a time within which the Government must make return cannot but transform the atmosphere as well as the procedure. As the court below observed, and as the available evidence indicates, the time consumed between the filing of a motion and its disposition can hardly fail to be greater than the ordinary interval in habeas corpus.<sup>9</sup> If, after denial of the motion, appeal to the court of appeals, and a petition for certiorari, the prisoner is perchance allowed to seek habeas corpus on the ground that the motion procedure was inadequate the writ has been effectively suspended for what may easily be one hundred

<sup>9</sup> See Memorandum cited in note 5, *supra*.

times the historic three-day period within which, since the English Act of 1679, the custodian is normally obliged to make a return.

Other opportunities provided on habeas corpus are apparently denied under the motion procedure. There is no provision for bail on appeal comparable to that which governs on appeal from the discharge of a writ of habeas corpus or on appeal from the granting of the writ. Cf. Rules of the Supreme Court, Rule 45. The *in forma pauperis* provisions have not been made applicable to the motion. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend or appeal *in forma pauperis* are to be paid by the United States. 28 U. S. C. Section 753(f). This has not been made applicable under Section 2255. Likewise, on habeas corpus a petitioner *in forma pauperis* is entitled to be furnished certified copies of relevant documents or parts of the record. 28 U. S. C. Section 2250. Despite the proximity of this section to 2255, and their common background, no similar provision is carried into the latter section.

A similar divergence between the habeas corpus sections and Section 2255 obtains with respect to the res judicata effect of a denial of the application. Section 2244, dealing with habeas corpus, provides:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

This section was drafted after the most careful and critical scrutiny by the Judicial Conference and its Committee. The phrase "and the judge or court is satisfied that the ends of justice will not be served by such inquiry" was inserted after a persuasive and eloquent statement by three members of the Committee, Judges A. L. Stephens, Underwood, and Wyzanski. See Government Brief, App. 154. That statement urged that without the quoted phrase the procedure would not be within the spirit of the constitutional provision against suspension of the writ. We venture to quote from that statement for its bearing not only on the precise issue of finality of determination but for its relevance to the whole case:

"Even the quite aggravating and indefensible practice of 'peddling' unmeritorious petitions of the same content around to different judges, after adverse rulings, does not afford a sufficient reason for irretrievably shunting off this historic writ of freedom with one court decision. Unjust and illegal imprisonment, by decree of court, despotic rulers, committees of citizens, or by scheming individuals, has been and continues to be a prime unatnable crime of man, causing unjust suffering and tragedy. No trouble or inconvenience to officials of our government, or cost to it, can justify the withdrawal of the right to a free, open and adequate official investigation into an imprisonment where the prisoner or someone for him asserts, as facts, statements which, if true, would establish its illegality. We venture to assert that there is no duty of a judge that transcends in importance the entertainment of the writ of habeas corpus. . . . That the writ may have been denied for the lack of proof and a witness to supply the lack becomes available perhaps years later makes no difference. A corrupt, vindictive or vicious man, a callous jailor, a careless or erring judge, a thousand combinations of circumstances, may cause the one and only petition allowable to fail."

The statement of these judges protested against a draft which would have precluded a judge from entertaining a second or subsequent application for habeas corpus where no new ground was presented. Faced with this background, the drafters of Section 2255 elected not to employ the standard which the Judicial Conference was persuaded to embody in the habeas corpus provision. At the time of the consideration by the Conference, the bill dealing with the motion procedure contained no provision for finality. When the matter came to be incorporated in the revision of Title 28 the provision adopted was this: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Thus it appears that if a prisoner is obliged to follow the motion procedure stricter standards of finality govern than if he were permitted to apply for habeas corpus. It is doubtful, under the language of the provision, whether an appellate court could reverse the sentencing court for failure to entertain a second motion, since the court "shall not be required" to entertain a successive motion.

Of course the procedure on habeas corpus is subject to regulation within limits. It has been so regulated in sections 2241-2254. But the cumulative effect of the departure in section 2255 is such that where the motion procedure applies the vitals of habeas corpus have been removed.

In making this submission, we are not unmindful of the problems raised by frivolous and multiple petitions. These problems have been attacked by the procedural provisions of sections 2241-2254. In particular it is now made clear that the sentencing judge may simply file a certificate with the habeas corpus court setting forth the facts occurring at the trial. Section 2245. Evidence may be taken orally or by deposition or by affidavit; in the latter event the parties have the right to propound written interrogatories or to file

answering affidavits. Section 2246. A rule to show cause may be issued before determining whether the writ should issue. Section 2243. The provision for court reporters should go far to obviate factual disputes regarding the conduct of the trial. Section 753. The denial of habeas corpus, while not conclusive, is entitled to great weight in the consideration of successive applications. *Salinger v. Loisel*, 265 U. S. 224.

What is wanted, clearly, is a procedure which will deter irresponsible applications and provide for their expeditious disposal while not placing impediments in the way of genuine complaints. If the procedural provisions for habeas corpus are not adequate to this end, other measures can doubtless be devised without impairing the function of the writ. Prosecutions for perjury stand open to the Government. There might even be considered a measure to provide legal advice to federal prisoners, much as medical and spiritual advisers are now provided. But the motion procedure is calculated to stimulate the very irresponsibility that reforms should discourage. The procedure puts a premium on the inventiveness of prisoners by holding out the prospect of a longer journey away from prison if the allegations are sufficiently impressive.

It would therefore cause no breakdown in the effort to meet the problems of habeas corpus if the motion procedure were to be held invalid.<sup>10</sup> Cf. Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 Yale L. J. 1183 (1950). An opportunity would be afforded for further legislative consideration in the light of this

<sup>10</sup> While "the motions under the statute have continued to mount," as Judge Denman states (R. 49), no decline in *habeas corpus* petitions is observable. In the three fiscal years just prior to the effective date of section 2255 in 1948, the numbers of such petitions by Federal prisoners were 379, 393, and 506, respectively. In the three fiscal years following, they were 481, 409, and 399, respectively. Speck, 10 Ohio St. L. J., *supra* note 5, Table I, and Memorandum of October 3, 1951.

Court's decision. Meanwhile this Court would have vindicated the principle that when faced with a whittling down of the liberty of the citizen the only safe course is *obsta principiis.*

**CONCLUSION**

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX A

Article I, Section 9, clause 2, of the Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

28 U. S. C. 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

## APPENDIX B

79th Congress 1st Session

H. R. 4233

In the House of Representatives

October 1, 1945

Mr. Sumners of Texas introduced the following bill; which was referred to the Committee on the Judiciary

### A BILL

To regulate the review of judgments of conviction in certain criminal cases

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceeding.

ing, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U. S. C. 380a), who shall constitute a special court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U. S. C. 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process unavailable to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration

of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the Circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

H. R. 6723, 79th Congress, 2d Session

In the House of Representatives

June 10, 1946

Mr. Sumners of Texas introduced the following bill; which was referred to the Committee on the Judiciary

**A BILL**

to regulate the review of judgments of conviction in certain criminal cases

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity, under the Constitution, treaties, or laws of the United States, of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. The phrase "no adequate remedy" as used in this section means absence of such State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the particular petitioner. An appeal shall lie to the circuit court of appeals from an order of discharge or, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76, 35 Stat. 40; 28 U. S. C. 466), from an order denying discharge.

Sec. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties, or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate

or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless such court shall determine that the motion presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the

writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time. The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

79th Congress, 2d Session

H. R. 7124

§ 2244. Finality of determination; rehearing

No circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of any person if it appears that the legality of such detention has been determined on a prior application for a writ of habeas corpus and the application presents no new grounds.

A new ground within this section may include a material change in applicable law subsequent to the prior determination.

The court or judge denying or dismissing an application for a writ of habeas corpus or making a final order adverse to the petitioner may for good cause grant a rehearing at any time.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court shall determine that the sentence imposed was unlawful or erroneous, it shall grant the prisoner appropriate relief which may include vacation or correction of the sentence, release or resentencing of the prisoner or the granting of a new trial.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.